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## WORKERS RIGHTS FROM EUROPE: THE IMPACT OF BREXIT

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### ADVICE

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#### Introduction

1. Any decision of the UK to leave the EU, now usually called “Brexit”, following the forthcoming referendum will potentially have very significant implications for workers’ rights. Against that background, the TUC wishes me to advise it on certain specific issues including, above all, the likely impact of Brexit on EU-derived rights in employment, including health and safety.
2. There is a short and long answer to that question. The short one: in broad terms, and subject to the specific terms of a future trading relationship between the UK and the EU providing otherwise, a future Government would have a pretty much unconstrained freedom of action in relation to those areas currently governed by EU social law relevant to employment. From a legal viewpoint it would be required to give effect to almost no legal rights in this area. Other international treaties which embody provisions protecting workers, even those signed by the UK, such as the European Social Charter of 1961 and some Conventions of International Labour Organisation (ILO), give workers far less legal protection than EU law against a deregulatory-minded executive. The same applies to the European Convention on Human Rights (ECHR). Because it principally gives effect to civil and political rights rather than socio-economic rights, it does not cover many important elements of the working relationship, such as pay and working time, and almost all those regulated at present by EU social law.<sup>1</sup> If

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<sup>1</sup> The principal exception to this is Article 11, which has some important effect on the protection of collective bargaining, strikes, picketing and ‘sweeteners’ to leave unions: see *Wilson, Palmer v United Kingdom* [2002] IRLR 568 (leading to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) ss 145A-F) and *Demir v Turkey* [2009] IRLR 766 (right to collective bargaining is an essential element of Article 11); but cf. *RMT v United Kingdom* [2014] IRLR 407 (ban on secondary action permissible under Article 11). The discrimination protection in Article 14 ECHR is only engaged if the discriminatory treatment falls within the ambit of another ECHR

the Human Rights Act 1998 (HRA) is replaced by a Bill of Rights, as proposed by the present Government in the Queen's Speech, the protection the ECHR offers to workers in their working life is likely to diminish further.

3. *Which* current EU-derived employment rights a future UK Government would in fact repeal, adjust or preserve is, of course, a much more open question, since it is affected by the political ideology of a future Government, the individual members within it, and pragmatic decisions about what is politically feasible at the time. But some indications of the targets of a future government with a deregulatory agenda, such as a Conservative administration,<sup>2</sup> can be gleaned from long-standing opposition of some past UK Governments to many EU social rights, and from hints in official policy documents already issued. Provisions especially vulnerable to repeal in the name of deregulation or protecting business probably include, I think, legislation on collective consultation, which hardly fit with the current Government's vision of the labour market; working time rules (a persistent thorn in the side of the UK Government, both Conservative and New Labour); some of the EU-derived health and safety regulations, the impact of which on employers the last government already sought to reduce; parts of TUPE, from which the Government has already tried to remove some 'gold plating'; legislation protecting agency workers, which was long resisted by the UK and which is in tension with preferences for a 'flexible' labour market, as well as protections given to other 'atypical' workers; and some elements of discrimination law to which businesses object most strongly, such as uncapped compensation or high levels of liability for equal pay (and perhaps types of discrimination on which there is much less political consensus, such as age discrimination). This is my view of what would be on the shopping list

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right, though it may provide some protection against discriminatory dismissals which affect private life: see *Boyratz v Turkey* [2015] IRLR 164. But the Articles of the ECHR will not stretch, for example, to rights against discriminatory treatment in all aspects of the work relationship (including pay), rights to maternity and parental leave, protection of part-time, fixed-term and agency workers, working time protections, many of the collective rights set out in EU law, protections on transfers of undertakings and so on.

<sup>2</sup> Conservative Governments have exhibited the greatest opposition to workers' rights, despite their recent conversion to national minimum wage legislation. But until recently the Labour Party, too, was hardly supportive of some EU labour rights, illustrated by its opposition to the Agency Workers Directive.

of a post-Brexit UK government with a deregulatory agenda, based on past history and signs in policy documents issued to date; I highlight some others below.

4. Others may be better-placed than me to judge which social rights, currently guaranteed by EU law, are vulnerable to change in the medium to long-term, and which enjoy sufficient political consensus to survive. It would be naïve to assume, however, that most, or even many, of the social rights set out below are immune against future repeal. The last coalition Government, though to a degree restrained by the Liberal Democrats, made clear its preference for a highly deregulated or 'flexible' labour market, exemplified by the 'Red Tape' challenge and the BIS Consultation, *Flexible, Effective, Fair: Promoting Economic Growth Through a Strong and Flexible Labour Market*,<sup>3</sup> which envisaged legal protections 'limited to the minimum necessary', said to be a core of 'fundamental protections' based on 'minimal intervention by Government'.<sup>4</sup> Conservative (and New Labour) Governments have repeatedly celebrated how the UK has one of the most lightly regulated labour markets among developed countries;<sup>5</sup> the logic of its economic arguments is that further deregulation, along the lines of the USA model, will give it a competitive advantage. Already, in the Beecroft Report the last Government dabbled with proposals of extreme deregulation in relation to areas not governed by EU law (principally unfair dismissal law).<sup>6</sup> If Brexit occurs, there will be no legal barrier to a Government legislating to create a labour market whose predominant feature is freedom of contract (for which read a legal system which permits the employer to dictate terms) - and in a context today where there is no longer the extensive collective bargaining coverage which can operate to correct the inequality of bargaining power between the individual

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<sup>3</sup> BIS, October 2011.

<sup>4</sup> Above, §§6, 9 at p 4.

<sup>5</sup> See e.g. the BIS Consultation, *Flexible, Effective, Fair*, note 3 above, at p 3.

<sup>6</sup> See A Beecroft, *Report on Employment Law* (24.10.11) which, as well as advocating the introduction of 'no fault' dismissal, also made clear its general opposition to labour market regulation in general, even going so far as to suggest the Government should risk infraction proceedings by not implementing the Agency Workers Directive. The report was apparently not adopted owing to opposition from the Liberal Democrats.

employer or employee or to compensate for the absence of legal rights.<sup>7</sup>

5. Of course, the long-term trajectory of the EU itself, including in the sphere of social rights, is subject to change. Recent publications from the Commission refer to the need to avoid over-regulation and red tape and to lighten the regulatory burden above all on SMEs.<sup>8</sup> However, so far as I am aware there are no serious threats to the social rights set out in this Advice, although there are some current consultations about the detail.<sup>9</sup> What is much less clear are the social rights relevant to employment which may arise in the future at EU level, and from which workers in the UK would not benefit in the event of Brexit (for example, if the current proposals to make changes to health and safety law or to strengthen the rights of parents and those with caring responsibilities lead to new EU legislation).<sup>10</sup> In light of both these considerations, the legal and factual premise of this Advice is that the EU social rights to which it refers will not significantly change in the foreseeable future: it takes those rights as a given, which dictate the policy choices open to any Member State for the foreseeable future.
6. A final important introductory point is that there are few provisions of EU

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<sup>7</sup> For the evidence, see B Van Wanrooy et al., *The 2011 Workplace Employment Relations Survey*.

<sup>8</sup> See e.g. European Commission, *Better Regulation for Better Results - an EU Agenda* (19.5.15, COM (2015) 215 final) at pp 5-7, drawing on the *Better Regulation Guidelines* (19.5.15 SWD (2015) 111 final) as part of the Commission's regulatory performance and fitness programme, or REFIT.

<sup>9</sup> The current Commission initiatives are set out in the document, *List of Planned Commission Initiatives*, dated 7.3.16 ([http://ec.europa.eu/atwork/pdf/planned\\_commission\\_initiatives\\_2016.pdf](http://ec.europa.eu/atwork/pdf/planned_commission_initiatives_2016.pdf)). They include: a proposal to consolidate the information and consultation Directives to standardise definitions and make the law simpler and more effective; an evaluation of occupational health and safety with the aim of 'increasing its effectiveness and efficiency' (see the *Commission Work Programme 2016*, (27.10.15, COM (2015) 610 final), Annex I at §14 and Annex 2 at §16), including proposals to amend the Framework Directive 89/391/EEC to modernise it and to ensure a high level of worker health and safety; a consultation about the effectiveness of the Written Statement Directive 91/533/EC in light of the increase in non-standard forms of employment; and proposals to amend the Posted Workers Directive to ensure a better balance between freedom to provide services and worker protection. A proposal to amend the Pregnant Workers Directive 92/85/EEC was withdrawn (see Annex II to the *Commission Work Programme 2015*), but see the consultation in note 10 below.

<sup>10</sup> See note 9 above and the Commission's Consultation of the Social Partners under Article 154 on *Possible Action Addressing the Challenges of Work-Life Balance Faced by Working Parents and CareGivers* (11.11.05, C(2015) 7754 final). See too the discussions about a 'Pillar of Social Rights', aimed at helping to foster upwards convergence in social rights in employment, though these are to be developed in the euro-area while allowing other Member States to join: see the Commission, *Launching a Consultation on the European Pillar of Social Rights* (8.3.16, COM(2016) 127 final).

law which limit the powers of a Member State to introduce national laws which are *more* favourable to workers. Many of the Directives conferring rights on workers state this explicitly; in other cases it is implicit in the goal of improving standards of worker protection. I highlight this below by reference to particular Directives. So any future Government more disposed than the present one to improving e.g. health and safety standards or granting workers new or stronger socio-economic rights would be perfectly able to do so from a legal perspective. EU law generally has nothing to say, for example, about the level of any national minimum wage, domestic unfair dismissal protection or domestic rules on strikes: these are general matters for Member States to legislate about and/or for domestic collective agreements.<sup>11</sup> By the same token, a Member State can introduce more favourable rules in almost all areas of labour law already governed by EU legislation, as the UK has occasionally done.<sup>12</sup>

7. The one exception to this rule is the effect that some of the EU economic freedoms, such as the freedom to provide services and freedom of establishment,<sup>13</sup> have on labour standards not set out in national law. In some circumstances these freedoms may limit the power of public bodies to require compliance with minimum labour standards, such as wage rates above the prescribed national minimum wage, in public contracts.<sup>14</sup> The same economic freedoms limit unions' rights of collective action aimed at introducing labour standards, such as rates of pay, which are higher than those required by the Posted Workers Directive 96/71 (which, under UK law at present, only requires contractors from other Member States to comply with rules on pay and the like laid down by national law, not in collective agreements). These issues are discussed in more detail below.<sup>15</sup> But these economic freedoms would not prevent a Government providing a higher level of protection for

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<sup>11</sup> See for an unusual exception, *Alemo-Herron* [2013] ICR 1116 discussed below in the context of TUPE.

<sup>12</sup> For example, by introducing an additional period of 1.6 weeks' annual leave in regulation 13A of the Working Time Regulations 1998.

<sup>13</sup> Articles 49 and 56 TFEU.

<sup>14</sup> See e.g. *Commission v Luxembourg* [2009] IRLR 288 and *Rüffert* [2008] IRLR 467, both of which are discussed below.

<sup>15</sup> See §§77ff below.

workers in national *law* (e.g. by increasing the national minimum wage), which would be binding on all workers in the UK, including posted workers. From the viewpoint of a Member State, then, the constraints on improving labour standards should probably be characterised as more political than legal (though the two shade into each other).

8. The long answer to the question is set out in this Advice. Its structure is largely formulated in accordance with the questions I have been asked, but at the outset I provide a short introduction to how EU employment rights operate in the UK legal order, because this is important to the degree of protection given to EU rights, before giving an outline of the specific rights guaranteed by EU law. At the end of the Advice, I give a summary of the points made in it.

#### **The status of EU rights in the UK**

9. The UK's accession to the EU by means of the European Communities Act 1972 (ECA 1972) had radical effects for its legal order. Although the UK signed a Treaty of Accession to the (then) Treaty of Rome, and is now a signatory to the existing treaties post-Lisbon, the Treaty on the Functioning of the EU (TFEU) and the Treaty of European Union (TEU), the legal effect of its membership of the EU goes far beyond those which flow from the signing of a 'normal' international treaty by the UK government.
10. **'Normal' treaties.** Any international treaty, such as the UN Conventions and the ILO Conventions, ratified by the UK have some legal effect. There is a strong presumption in favour of interpreting English law in a way which does not place the UK in breach of its international treaty obligations, so that ambiguous words should be interpreted in accordance with the Treaty.<sup>16</sup> But, quite apart from the power of the UK Government to denounce the relevant treaty and so put an end to any duty to comply with it,<sup>17</sup> this rule poses no threat to Parliament's powers. A treaty signed by the UK Government of itself

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<sup>16</sup> See *R v Lyons* [2003] 1 AC 976 (decided on the premise that the HRA did not apply to the offences at the time) per Lord Bingham at §13, Lord Hoffman at §§27-8; *Hounga v Allen* [2014] ICR 847 at §50. See too *Garland v British Rail* [1983] 2 AC 751 per Lord Diplock at 771A-C

creates no rights enforceable by individuals. Where Parliament makes it plain by its language or otherwise that it intends to pass domestic legislation inconsistent with a provision in such an international treaty, that legislation will 'trump' its treaty obligations. The prime examples of this in the employment field are those ILO Conventions ratified by the UK, which have had little independent practical effect on UK labour laws.<sup>18</sup>

11. The duties under EU law bite much more deeply. They are supra-national rules with which UK law must comply: Parliament cannot legislate contrary to them, so that EU law takes primacy over national law and operates as a limitation on its sovereign powers.<sup>19</sup> Many EU rights, for example, are directly enforceable by individuals even in the absence of, or in direct contradiction of, domestic legislation. Where domestic legislation is inconsistent with EU rights, ultimately the EU rights must prevail. Books have been written on the legal means of giving effect to this duty, so I only summarise the most important rules below.
12. **The interpretation of EU social rights.** The general approach of the ECJ is to interpret social rights in the employment sphere widely, not narrowly.<sup>20</sup> By the same token, any derogations from social rights tend to be approached narrowly. This 'rule' is not universal,<sup>21</sup> but it means that generally the rights considered in this Advice have been given a broad reach. It should be contrasted with the approach of the UK courts, where the focus tends to be much more on the specific language of the provision and where judges are unaccustomed to social rights, which are a recent addition to UK law, and are often inclined by intuition against them. Many examples could be given of how ECJ decisions on employment rights have reversed the over-narrow

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<sup>17</sup> As the UK has done in the case of some ILO Conventions.

<sup>18</sup> The principal means of using ILO Conventions has thus been parasitically, either by arguing that they inform Article 11 ECHR on e.g. the right to strike (see e.g. *Metrobus v Unite* [2010] ICR 173, *RMT v Serco* [2011] ICR 848 at §8-9) or because they inform EU law (as in the case e.g. of the Working Time Directive, which refers to the ILO Conventions in its recitals and which has influenced ECJ decisions in this area).

<sup>19</sup> See *Costa v ENEL* [1964] ECR 585 at 593-4.

<sup>20</sup> See recently, for example, the Grand Chamber in *CHEZ Razpredelenie* [2015] IRLR 746 at §42.



interpretations given by domestic courts. Equal pay and sex discrimination are good examples;<sup>22</sup> another is working time where in many cases the Court of Appeal, coming from a common law tradition based on the contract of employment, was resistant to any interpretation favourable to workers, only to be reversed by the ECJ.<sup>23</sup> Without the corrective role of the ECJ, those domestic decisions would almost certainly have survived, depriving the social rights of much of their effect.

13. Moreover, increasingly the ECJ has regard to other international treaties in interpreting the scope of EU social rights (see below). By this means provisions of some UN Conventions and ILO Conventions have had some influence on the development of EU social law (though the point should not be over-stated). The result is that, by this indirect means, those international social rights instruments can have a greater effect on domestic law than they would do merely because the UK signed an international treaty itself.
14. **Direct effect.** Some provisions of EU law can be relied upon directly by individuals in national courts, provided they are sufficiently precise.<sup>24</sup> They require no domestic legislation as a vehicle by which to bring a claim. This includes, first, some Articles of the Treaty; the most well-known in the employment field is Article 157, on equal pay between men and women, which the ECJ held in *Defrenne v Sabena (No.2)* [1976] ECR 455 was directly effective not only against state bodies but also against private bodies, meaning that it could be relied upon by individuals even in the absence of, or

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<sup>21</sup> Cf. e.g. *Alemo-Herron* [2013] ICR 1116

<sup>22</sup> See, for example, the important decisions in *Enderby* and *Webb v EMO*, both discussed below.

<sup>23</sup> Examples of cases where the confident analysis of Court of Appeal proved to be completely wrong include: *Marshall's Clay v Caulfield* [2004] ICR 1502 (rolled up holiday pay did not infringe Article 7); cf. *Robinson-Steele* [2006] ICR 932, ECJ (yes it did); *Gibson v East Riding* [2000] IRLR 598, CA (Article 7 not directly effective; cf. *Dominguez* [2012] IRLR 321, ECJ - Article 7 is directly effective); *Stringer* [2005] ICR 1149, CA (worker on sick leave not entitled to annual leave; cf. *Stringer* [2009] 932, ECJ - yes they were); *Bamsey* [2004] ICR 1183, *Williams* [2009] ICR 906, CA (no prescribed level of pay for annual leave under Article 7; contrast the ECJ in Case C-155/10, *Williams v British Airways* [2012] ICR 847 and *Lock v British Gas* [2014] ICR 813).

<sup>24</sup> See *Francovich* at [1994] ICR 722 at §§12-27 and *Three Rivers DC v Bank of England* [2003] 2 AC 1 per Lord Hope at 198F-203C (both cases also deal with the liability of a Member State to pay damages for the failure to introduce national legislation correctly implementing a Directive).

in conflict with, any domestic legislation.<sup>25</sup>

15. The doctrine of direct effect extends, second, to Articles of Directives, which are the instrument used to give effect to most employment rights. So long as these Articles are unconditional and sufficiently precise, they may be relied upon directly by individuals in UK courts, regardless of national legislation, but only against an emanation of the state (though the state has a broad meaning for this purpose and includes e.g. local authorities, NHS trusts, many privatised utilities, police authorities and others). Many Articles of Directives conferring employment rights meet this test, so that workers can rely on the Directives themselves in national courts.
16. Third, horizontal direct effect extends to general principles and fundamental rights under EU law. These include the right not to be discriminated against on grounds of age: see *Küçükdeveci v Swedex* [2010] IRLR 346. Though a nascent category, the logic of *Küçükdeveci* extends to all forms of discrimination protected against by EU law, including sex, race, ethnic origin, religion and belief, disability and sexual orientation, all of which are referred to in Article 21 of the Charter of Fundamental Rights of the EU (the 'EU Charter').<sup>26</sup> It may also extend to sufficiently precise provisions in international conventions, such as those in the ECHR,<sup>27</sup> though it seems not to the right to paid annual leave.<sup>28</sup> These fundamental rights will then take automatic effect in the UK, overriding any inconsistent national legislation.
17. **Interpretative obligation.** The second fundamental means of giving effect to EU law is by means of the interpretative obligation. Domestic law in the field of EU law must, so far as is possible, be interpreted to achieve the result sought by EU law, now usually referred to as the *Marleasing* duty.<sup>29</sup> This 'broad and far-reaching' obligation extends to all national law, and not only

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<sup>25</sup> The same applies to EU Regulations, though these are less used in the employment sphere.

<sup>26</sup> See on this *Hennigs* [2012] IRLR 23, where the ECJ referred to Article 21, and *X v Mid Sussex CAB* [2011] ICR 460, CA, where Elias LJ indicated protection against disability discrimination would also be a fundamental principle of EU law.

<sup>27</sup> See the discussion of the principle by AG Trstenjak in *Dominguez* [2012] IRLR 321.

<sup>28</sup> See AG Trstenjak in *Dominguez* [2012] IRLR 321.

implementing legislation or legislation which is ambiguous. It permits domestic courts to add words to domestic legislation to ensure conformity with EU law, provided that doing so does not go against the 'grain' or 'thrust' of the legislation.<sup>30</sup> It is a much stronger duty than the duties of interpretation where the UK is merely a signatory to another international treaty.

18. The *Marleasing* duty has had a radical effect in the domestic courts. It enabled the House of Lords to read in words to prevent avoidance of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) in *Litster v Forth Dry Dock* [1989] ICR 341 and to do away with the need for a male comparator in the case of pregnancy discrimination (*Webb v EMO* [1995] ICR 1021); it led to adding new provisions protecting against associative discrimination into the Disability Discrimination Act 1995 in *EBR Attridge LLP v Coleman* [2010] ICR 242; and it enabled the addition of words to the Working Time Regulations to ensure that workers received the same entitlements to paid annual leave as the Directive required: see *NHS Leeds v Larnier* [2012] ICR 1389 and, most recently, *Bear Scotland v Fulton* [2015] ICR 221. The strength of this obligation, perhaps especially where implementing legislation is concerned, means that this route almost invariably achieves compliance with EU law. The result is to give both 'horizontal' and 'vertical' effect to EU law, including employment rights conferred by EU Directives, even where by traditional rules of interpretation the meaning of the statute was clear.<sup>31</sup>
19. **Infringement proceedings and the *Francovich* duty.** These individual rights of action are buttressed by two further mechanisms of EU law.

- (1) In the unlikely event that a provision of EU law cannot be given effect either by the *Marleasing* duty or by direct effect (for example, the

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<sup>29</sup> *Marleasing v La Comercial* [1990] ECR I04153

<sup>30</sup> The principle is summarised in *Rowstock Ltd v Jessemy* [2014] ICR 550 per Underhill LJ at §§40-41, adopting the summary of Sir Andrew Morritt in *Vodafone 2 v Revenue and Customs* [2010] Ch 77 at §37 of the relevant principles, including those from the speeches of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

<sup>31</sup> On ordinary rules, for example, the cases listed above would almost certainly have been

action is based on a Directive against a private body), in some circumstances a direct action for damages can be brought against the UK Government for damages for its failure to implement EU law: this is known as a *Francovich* action.<sup>32</sup> This could arise, for example, if the UK government failed to implement a Directive at all or on time or failed to modify domestic legislation in accordance with a ruling of the ECJ to ensure workers were protected in accordance with EU law.

- (2) The European Commission can bring infringement proceedings against a Member State which it considers has failed adequately to implement EU law. This can follow notice to the Commission from a third party such as a trade union. After investigating and delivering a reasoned opinion, the Commission may refer the matter to the ECJ and if the national government fails to comply with a judgment against it, after a further referral to the ECJ it may order the state to pay a lump sum or a penalty.<sup>33</sup> Examples of this procedure successfully applying in the employment field against the UK include requiring it to introduce equal pay for jobs of equal value where no job evaluation study had yet been carried out into equal pay law.<sup>34</sup> It also led to important amendments to TUPE 1981 and the collective redundancies procedure in s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) so as, among other matters, to require consultation at workplaces where the employer chose not to recognise a union, to trigger consultation for dismissals involving changes to terms and conditions, to define consultation as being “with a view to reaching agreement”, and to remove limitations on the compensation payable.<sup>35</sup>

**20. Procedures and remedies.** The final duties which emphasise the high level of protection given to EU-derived rights relate to the procedures and remedies for enforcement.

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decided the other way.

<sup>32</sup> See *Francovich* at [1994] ICR 722 and *Three Rivers DC v Bank of England* [2003] 2 AC 1.

<sup>33</sup> See Articles 258-250 TFEU.

<sup>34</sup> *Commission v UK* [1982] ICR 578.

<sup>35</sup> *Commission v UK* [1994] ICR 664

21. By virtue of Article 19 TEU, Member States must provide remedies “sufficient to ensure effective legal protection” of rights conferred by EU law. Similarly, by Article 47 of the EU Charter, which following the Treaty of Lisbon has the same legal value as the Treaties,<sup>36</sup> “everyone has the right to an effective remedy before a tribunal” if their EU-guaranteed rights are violated, and “legal aid shall be made available to those who lack sufficient resources in so far as necessary to ensure effective access to justice.”
22. The need for effective protection of rights is expressed in various principles. First, by virtue of the principle of effectiveness, domestic procedural rules must “not render practically impossible or excessively difficult the exercise of rights conferred by Community law”.<sup>37</sup> So, for example, in *Levez* [1999] ICR 521 the principle precluded a limitation of two years’ recovery of arrears of pay in equal pay proceedings where the employer lied about the true value of a man’s salary and so caused delay in issuing proceedings.<sup>38</sup> The principle has even been extended by the ECJ so as potentially to enable claimants to bring a claim in a specialist labour tribunal rather than the ordinary courts where this is cheaper and has procedural advantages.<sup>39</sup>
23. Second, under the principle of equivalence, the rules for enforcing EU law must not be less favourable than those for enforcing comparable domestic rights. This meant, for instance, that claims for underpayments of holiday pay could be brought as a series of unlawful deductions from wages, under Part II of the Employment Rights Act 1996 (ERA), rather than a claim having to be made under the Working Time Regulations within three months of every occasion when holidays were under-paid.<sup>40</sup>

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<sup>36</sup> See Article 6 TEU.

<sup>37</sup> See the Grand Chamber in *Unibet* [2007] ECR I-2771 §§ 37-43.

<sup>38</sup> This led to changes to the Equal Pay Act 1970 now found in the Equality Act 2010. Requiring part-time workers to issue equal pay proceedings within six months of the end of each short-term employment contract was equally contrary to the principle in *Preston v Wolverhampton Healthcare NHS Trust* [2000] ICR 961.

<sup>39</sup> See the Grand Chamber in *Impact* [2008] IRLR 552.

<sup>40</sup> See *Revenue and Customs Comrs v Stringer* [2009] ICR 985.

24. A third, very important element of effectiveness is that, while it is for the Member State to decide on the form of sanctions for breach of EU law, those sanctions must be effective, proportionate and dissuasive.<sup>41</sup> An early manifestation of this principle, though based on the wording of the (then) Equal Treatment Directive, was *Marshall (No.2)* [1993] ICR 893, in which the ECJ ruled that where the UK chose to confer a right to compensation for victims of sex discrimination at work, that compensation had to be adequate for the loss and could not be subject to an upper limit (and had to include interest too). The need for financial remedies to give full compensation for the loss caused by infringements of EU rights has since been confirmed in other cases.<sup>42</sup> Reflecting these principles, recital (33) and Article 18 of the Equal Treatment Directive, 2006/54/EC (on equal treatment between men and women in employment), for example, expressly states that it is inappropriate to include any cap on compensation. These principles on full compensation for loss have been reiterated recently in Case C-407/14, *Camacho v Securitas Seguridad Espana*, ECJ.<sup>43</sup>
25. The provisions on adequate and deterrent compensation find their domestic expression in the absence of any cap for damages in e.g. discrimination, equal pay and other areas implementing EU rights, such as the punitive measure of protective awards for a failure to engage in collective consultation on redundancies under s.188 TULRCA.<sup>44</sup> They can be contrasted with the low financial ceilings on compensation for infringements of purely domestic rights, such as unfair dismissal, reduced by the last Government to a maximum of one year's salary or the statutory cap, whichever is lower.<sup>45</sup> If Brexit happens, these uncapped levels of compensation may well be in the sights of a Government with a deregulatory agenda.
26. **Summary.** The above rules illustrate how powerful are the duties to give

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<sup>41</sup> See e.g. *Commission v Greece* [1992] ECR I-673, ECJ.

<sup>42</sup> See e.g. *Metallgesellschaft* [2001] ECR I-1727, ECJ and, in the field of worker consultation, *Commission v UK* [1994] ICR 664.

<sup>43</sup> Judgment issued on 17.12.15.

<sup>44</sup> See *Susie Radin v GMB* [2004] ICR 893, especially per Peter Gibson LJ at §28.

<sup>45</sup> See s.124(1ZA) ERA

effect to and protect rights conferred by EU law, including those rights conferred on workers in Directives. By various means the law circumscribes the powers of Parliament, the state and courts to act contrary to EU law. These rules are *much* stronger than the presumption that legislation should be construed in accordance with the UK's other international treaty obligations, such as UN and ILO Conventions, which do not limit the UK's freedom to legislate in a manner inconsistent with them. They are also a more powerful constraint than the corresponding provisions of domestic law giving effect to the ECHR, by means of the HRA. While the rules on interpretation are similar, under the HRA Parliament retains ultimate freedom, if it makes that plain, to pass legislation contrary to the ECHR. Hence (i) the potential for a declaration of incompatibility under s.4 HRA (and the absence of an analogue for infringement proceedings), and (ii) the defence a public authority has to a direct action against it under s.6 HRA, that primary legislation prevented it acting differently. The model of the HRA thus preserves Parliamentary sovereignty, though many critics pretend otherwise. By contrast, by reason of its membership of the EU, the UK must ensure that effective protection is given to EU social rights, and cannot legislate to the contrary (that is, unless it leaves the EU and repeals the ECA 1972).

### **(1) The Key Rights in Employment**

27. The first question on which I am asked to advise is the likely impact of Brexit on EU-derived employment rights. A reasonable summary of the EU-based rights which apply in the employment tribunal is set out as Annex 2 to the judgment of the Court of Appeal in *R (on the application of UNISON) v Lord Chancellor (No.3)* [2015] IRLR 911. This list excludes, however, the important health and safety duties set out in various Directives including, especially, what is known as the 'six pack', and also omits some other relevant provisions such as EU data protection law. A comprehensive account of the relevant EU rights in this sphere is contained in C Barnard, *EC Employment Law*,<sup>46</sup> though its focus is on the EU provisions and it gives little attention to the domestic implementation or the resistance to such rights among political parties in the UK.

28. As my Instructions recognise, it is only possible to give a broad overview of the relevant rights, which I provide below together with references to some of the key provisions or cases. *All* of these rights and standards are vulnerable to repeal in the event of the UK leaving the EU. Which ones would *in fact* be revoked is less a legal question than a political and sociological prediction; but I highlight below some of those which appear to be vulnerable to attack by, especially, a future Government whose priorities are similar to those of the present one.
29. It is important to note, as I have already mentioned, that the social rights set out below are required standards but almost all are only minimum standards; they are a floor not a ceiling. They do not prevent a Member State, such as the UK, passing employment laws which confer a higher level of protection on workers. In many cases Directives state this explicitly.<sup>47</sup> Many Directives equally make clear that they must not provide the basis for a lowering of existing domestic standards of protection.<sup>48</sup>
30. **Discrimination rights.** Protection against discrimination is a fundamental aim of the EU, as stated in Articles 8 and 10 TFEU, and equality is now recognised by the ECJ as a fundamental value which takes priority over the economic aims of the Treaty: see e.g. *Deutsche Post* [2000] ECR I-929 at §57. Discrimination in employment is now fully underpinned by EU law, which has had many important consequences for domestic law, in favour of workers' rights and remedies. The relevant Directives and Articles of TFEU are set out below, which are given domestic effect by principally the EqA 2010.
31. The combined effect of these rules is to protect against the relevant kinds of

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<sup>46</sup> Oxford University Press, 4<sup>th</sup> edition, 2012.

<sup>47</sup> See e.g. the Framework Directive on Health and Safety, 89/391, at Article 1(3); the Contracts of Employment Directive 91/533, Article 7; clause 6 of the Annex to the Part-time Workers Directive 97/81/EC; Article 5 of the Collective Redundancies Directive 98/59; Article 6 of the Race Directive 2000/43; Article 8 of the Equality Framework Directive 2000/78/EC, and so on.

<sup>48</sup> See e.g. Article 6 of the Race Directive; Article 8 of the Equality Framework Directive.



discrimination at all stages of employment, from access to employment, through treatment at work including pay, to dismissal, and even including post-employment victimisation. The Directives contain special rules on the burden of proof to ensure that victims of discrimination have effective means of vindicating their rights.<sup>49</sup> As a result of the ruling in *Marshall No.2*, in every case the Directives require that compensation fully compensates successful claimants for their loss.

32. Many of rights in the Directives are or are likely to be sufficiently precise to be directly effective against emanations of the state.<sup>50</sup> Moreover, as set out above, following *Küçükdeveci*, the rights may well be of direct effect horizontally, against private employers.
33. Providing protection against sex discrimination and unequal pay between men and women were early EU social rights. Now the Equal Treatment Directive, 2006/54/EC, protects against direct or indirect sex discrimination in employment, including pay. In addition, Article 157 TFEU, formerly Article 141 and before that Article 119, requires equal pay for male and female workers. This Article is horizontally effective, as the ECJ recognised long ago in *Defrenne No. 2* [1976] ICR 547 and so can be relied on against state bodies and private sector employers. The important provisions of the Directives, too, are directly effective against emanations of the state.
34. It is difficult to overstate the significance of EU law in protecting against sex discrimination. The ECJ has repeatedly acted to correct decisions of the domestic courts which were antithetical to female workers' rights: a history could be written based on the theme of progressive decisions of the ECJ correcting unprogressive tendencies of the domestic courts. Any list is selective, but the important provisions and decisions include those in the following areas.

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<sup>49</sup> Originally derived from the Burden of Proof Directive 97/80 and now found in the discrimination Directives: see Article 19 of the Equal Treatment Directive 2006/54/EC, Article 8 of the Race Directive 2000/43/EC and Article 10 of the Framework Directive 2000/78/EC, implemented domestically (now) by s.136 EqA 2010.

<sup>50</sup> See e.g. *Marshall No.1* [1986] ECR 726 and *Marshall No.2*, above.

- (1) In recognition of the foundational importance of equal pay in EU law, the ECJ extended equal pay laws to cover all forms of pay relating to the employment relationship, regardless of their source,<sup>51</sup> and in both the public and private sectors, including pensions: see **e.g. Barber** [1990] ECR I-1889 and **Collorol** [1995] ICR 179, especially at §26. This led, for example, to changes to domestic legislation<sup>52</sup> because retirement benefits were excluded from the domestic Equal Pay Act 1970, and equalisation by means of ‘levelling up’ of pension benefits for men and women across almost all sectors. The impact was important for probably hundreds of thousands of women: see e.g. the part-time pensions litigation in the banking sector which took place at an early stage, the more recent litigation in the NHS known under the lead claimant as **Preston**, and other claims in the private and public sectors - which continue to this day<sup>53</sup>).
- (2) Clarifying that equal pay embraced work of equal value for which no job evaluation study had been done, and so potentially applied wherever there was evidence of systemic under-payment of women: see **Commission v UK** [1982] ICR 578, **Enderby** [1994] ICR 112, **Danfoss** [1992] ICR 74. The effect of these decisions, belatedly, drove the public sector bonus litigation which resulted in back payments to tens of thousands of women.
- (3) Extending indirect sex discrimination beyond where the employer imposed a requirement or condition,<sup>54</sup> and laying down a strict test of objective justification where pay or other practices had a disproportionate effect on women: see e.g. **Bilka-Kaufhaus** [1987] ICR 110, **Kutz-Bauer** [2003] IRLR 368. These decisions had considerable

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<sup>51</sup> Even in some circumstances allowing cross-employer comparisons: **Lawrence v Regent Office** [2002] ECR I-7325.

<sup>52</sup> At the time by ss 62-65 of the Pensions Act 1995 because retirement benefits were excluded from the Equal Pay Act 1970.

<sup>53</sup> See most recently **Safeway v Newton** [2016] EWHC 377 (Ch).

<sup>54</sup> See **Enderby**, above, and now

impact, in particular, on improving the position of part-time workers, who were and are overwhelmingly female. I doubt domestic law alone, without the input of the ECJ, would have achieved this result.

- (4) Ruling that pregnancy was a condition unique to women, so that sex discrimination could arise without the need for comparison with a sick man, and as a result giving women special protection against any detrimental treatment because of pregnancy or owing to absence in a protected period of maternity leave: *Webb v Emo* (above), *Dekker* [1992] ICR 325, *Gillespie* [1996] ICR 498.
- (5) Requiring effective remedies for work-related sex discrimination, so precluding caps on damages or some temporal limitations on arrears of damages: *Levez* (above), *Marshall No.2* (above), *Magorrian* [1998] ICR 979.
- (6) Protecting against gender reassignment discrimination, now one of the protected characteristics under the EqA as a direct result of the ruling of the ECJ in *P v S* [1996] ICR 795.<sup>55</sup>
- (7) Extending discrimination protection to embrace post-employment victimisation owing to the principle of effectiveness, which in turn led to explicit adoption of this in all the relevant Directives and domestic law:<sup>56</sup> see *Coote v Granada Hospitality* [1999] ICR 100 where at §24 the ECJ held that the right to effective judicial protection against discrimination between the sexes would be “deprived of an essential part of its effectiveness” if it did not protect workers against measures which a former employer might take in retaliation for post-employment proceedings brought by the employee.
- (8) Introducing protection against harassment which led to important

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<sup>55</sup> Which led to the insertion of a new s.2A in the Sex Discrimination Act 1975 by the Sex Discrimination (Gender Reassignment) Regulations 1999; see now s.

<sup>56</sup> See now s.108 EqA 2010.

changes to domestic legislation, widening its reach to ensure it complied with EU law.<sup>57</sup>

35. The other Directives on discrimination are more recent additions to Community law. Directive 2000/43/EC protects against discrimination at work on the basis of racial or ethnic origin, and the Framework Directive 2000/78/EC protects against discrimination owing to religion or belief, disability, age or sexual orientation in employment or occupation. In keeping with the law on sex discrimination, they protect against both direct and indirect discrimination before, throughout and after the employment relationship. The decisions on sex discrimination will be, for the most part, read across so as to apply equally to them.
36. There have been fewer important rulings on these Directives owing to their more recent introduction. But, again, the drift of the ECJ has been to interpret the provisions broadly, in keeping with a vision that protection against discrimination is a fundamental right which has a wide and intensive application in the workplace. This is highlighted by the following decisions:
  - (1) In the sphere of disability discrimination, the ECJ has made clear that it will interpret disability discrimination law in light of the UN Convention on the Rights of Persons with Disabilities, which the EU has approved, so as to promote the full and effective participation of persons with disabilities in society: see *Ring* [2013] ICR 851. In the same vein, it has adopted a wide conception of disability, extending it to include impairments which affect professional life and not just daily activities outside work: see *Chacón Navas* [2007] ICR 1. It ruled that protection in this field includes associative discrimination, leading to a re-interpretation of the Disability Discrimination Act 1995, which would not have been possible but for EU law: see *Coleman* [2008] ICR 1128. Associative discrimination is now, as a result, protected against

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<sup>57</sup> See *EOC v Secretary of State for Trade and Industry* [2007] ICR 1234, holding that the requirement of “on the ground of her sex” amounted to inadequate implementation of the then Equal Treatment Directive 76/207/EC (see now Article 2(2)(a) of Directive 2006/54/EC) and which led to changes to the Sex Discrimination Act 1975 (see now s.26 EqA 2010).

by the EqA 2010.

- (2) In race discrimination too, the clear signs are that the ECJ will adopt a wide and progressive approach because of the objectives of Directive 2000/43/EC and the fundamental importance of equality: see *CHEZ Razpredelenie* [2015] IRLR 746, where it extended the logic of *Coleman* further and held that the aim of the Directive meant that it protected not only members of a particular ethnic group but also others who suffered less favourable treatment as a result of discriminatory practices.<sup>58</sup> This decision have radical effects in the future for UK law, though its consequences have not yet been tested in the domestic courts.
- (3) Age discrimination was introduced by the UK government at the latest possible time, and only because it had to comply with the Framework Directive.<sup>59</sup> It has since been very strongly driven by EU law, and the many judgments of the ECJ include the important ruling in *Küçükdeveci*, in which the ECJ determined that non-discrimination on grounds of age is a general principle of EU law, which was directly effective against private bodies, and which overrode inconsistent national legislation. The important influence of the Directive and the ECJ decisions on it is shown by two recent decisions of the Supreme Court. First, *Seldon v Clarkson Wright* [2012] ICR 716 where, in reliance on the ECJ case-law, Baroness Hale said that age discrimination (here a compulsory retirement age) could only be justified by public interest objectives, broadly categorised as inter-generational fairness and dignity, so making it much harder to justify age discrimination and probably relevant to the abolition of the default retirement age in the UK. Second, *Homer v Chief Constable of West Yorkshire* [2012] ICR 704, where the leading judgment was again given by Baroness Hale, who explained that the test for showing “particular

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<sup>58</sup> See especially §§56-60.

<sup>59</sup> See the Employment Equality (Age) Regulations 2006, introduced under the ECA 1972, and which came into force on 1 October 2006 (regulation 1), the latest date for implementation: see the

disadvantage” in the equality legislation, derived from the EU Directives, was intended to make it easier to establish indirect discrimination<sup>60</sup> - a decision which applies to all types of indirect discrimination - and stressed the strictness of justifying age discrimination by reference to rulings of the ECJ.<sup>61</sup>

- (4) Protection against religion and belief discrimination was enacted precisely to comply with the Framework Directive 2000/78/EC. The recitals to the Directive refer to the corresponding duty in Article 9 of the ECHR, meaning that the rulings of the European Court of Human Rights will be read into the Directive and hence domestic law. These include the decision in *Eweida v UK* [2013] IRLR 231 holding that an employer’s corporate image was not sufficient justification to bar the wearing of small religious symbols at work. Hence, whatever a future Bill of Rights may say in relation to the HRA 1998, in the workplace EU law will continue to follow the case-law on Article 9 ECHR, and the delicate balance it strikes between the objectives of employers and freedom of religion and belief.<sup>62</sup>
- (5) Protection against discrimination because of sexual orientation, introduced by the Employment Equality (Sexual Orientation) Regulations 2003, was also a direct consequence of the Framework Directive.<sup>63</sup> Prior to that, domestic law gave no real protection against this form of discrimination.<sup>64</sup> Even after the ruling of the ECtHR in *Smith v UK* [1999] IRLR 734, holding that the ban on gay men and lesbian women serving in the armed forces was contrary to Article 8 ECHR (on private life), it was EU law in the form of the Directive which led to regulations to address this form of discrimination, protection now cemented in the EqA 2010.

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Framework Directive, Article 18.

<sup>60</sup> See §14.

<sup>61</sup> At §22-26.

<sup>62</sup> See most recently *Ebrahimian v France*, ECtHR, 26.11.15 (on Hudoc)

<sup>63</sup> The Regulations were introduced under the ECA 1972.

<sup>64</sup> See *MacDonald v Ministry of Defence* [2003] ICR 937, HL.

37. **Future targets for repeal?** Protection against sex, race and disability discrimination in the UK pre-dated EU law and has probably, for the present, gained sufficient political consensus that it unlikely a government of any political persuasion would repeal the laws in the foreseeable future in the event of Brexit. At the moment, too, the law is set out in primary legislation, the EqA 2010. But that is not to say that a future Government with a strong deregulatory agenda would not amend the legislation, though in what respects is not easy to predict.
38. The extent of compensation for discrimination is one plausible target. Already, in the consultation which preceded the introduction of fees in the employment tribunal, the coalition Government proposed a form of cap on compensation if a claimant had not paid a fee at the correct level.<sup>65</sup> This drew on its commitment to review discrimination awards as part of its Employment Law Review in order to address business fears about high awards; but, as the Government acknowledged in the consultation, because ‘discrimination law derives from European legislation, it is prohibited to set a fixed cap on discrimination awards, which effectively restricts the policy options available to address concerns in this area’, and the proposal may well have been dropped owing to its potential incompatibility with EU law.<sup>66</sup> Implicit in the Government’s statement is that if it were not constrained by EU law it might well have capped discrimination awards. Given the Government’s often justifying action because of business fears of high awards - illustrated by the consultation before fees, the one-year salary cap on unfair dismissal compensation, the action taken to remove civil compensation for breach of health and safety regulations (see below), and the immediate action to reduce businesses’ liability for holiday pay claims<sup>67</sup> - it would be unsurprising if action were taken to limit employers’ exposure to liability for

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<sup>65</sup> See the Consultation Paper, *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal* (14 December 2011).

<sup>66</sup> A point made by some of the respondents to the consultation, including the Institute of Employment Rights.

<sup>67</sup> See the Deduction from Wages (Limitation) Regulations 2014, introduced swiftly in the wake of the EAT decision in *Bear Scotland*.

discrimination and, especially, large discrimination and equal pay claims.<sup>68</sup>

39. The protection of pregnant women, too, may be a target given business objections to cases such as *Webb*. So too may be those forms of discrimination which were only implemented because of EU law and which enjoy less political consensus, in particular age discrimination. The fundamental point, however, is that the whole legal edifice is vulnerable to challenge: instead of complaining about progressive decisions of the ECJ, or the expensive consequences to business of discrimination law, if a domestic court arrived at a decision to which the government objected, the Government could simply change the law, and quickly.
40. **Pregnancy, Maternity and Parental Leave.** As I have already mentioned, ECJ cases on the Equal Treatment Directive on sex equality in employment, originally 76/207 and now 2006/54, determined that detrimental treatment because of pregnancy amounted to sex discrimination. Recognising that pregnancy is unique to women and should not require a male comparator, the ECJ cases protected pregnant women against non-appointment to employment,<sup>69</sup> dismissal because of pregnancy or taking maternity leave,<sup>70</sup> and discrimination in terms and conditions except pay during maternity leave.<sup>71</sup> The cases were a marked departure from how domestic courts had interpreted and applied the Sex Discrimination Act 1975, illustrated by the judgement of the House of Lords in *Webb* prior to the matter being referred to the ECJ, where it made clear that it would have compared Mrs Webb with a man who was unable to work, so that her dismissal would not have been direct discrimination.<sup>72</sup> It was only the ECJ ruling that caused the House of Lords subsequently to change its mind.<sup>73</sup> The case-law is now reflected in Article 2(2)(c) of the Equal Treatment Directive, by which discrimination includes any less favourable treatment related to pregnancy or maternity

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<sup>68</sup> Prior to the decision in *Marshall (No.2)* there was such a cap in UK law.

<sup>69</sup> *Dekker* above.

<sup>70</sup> *Webb*, above, and *Hertz* [1992] ICR 332.

<sup>71</sup> See e.g. *Thibault* [1996] ICR 160.

<sup>72</sup> [1993] ICR 175.

<sup>73</sup> See the later decision [1995] ICR 1021.



leave under the Pregnant Workers Directive 92/85, faithfully reproduced in s.18 EqA.<sup>74</sup>

41. Protection of pregnant workers is supplemented by the Pregnant Workers Directive 92/85, which lays down minimum standards to protect the health and safety of pregnant women and which cannot justify a lowering of the standard in each Member State.<sup>75</sup> In addition to requiring assessments and measures to protect against risks to pregnant workers' health and safety,<sup>76</sup> the Directive confers compulsory rights to at least 14 weeks' maternity leave paid at the level of an adequate allowance which is least at the level of sick pay,<sup>77</sup> paid time off for ante-natal examinations if these have to take place in working hours,<sup>78</sup> a prohibition on dismissal from the beginning of pregnancy until the end of the 14-week period (save in exceptional cases),<sup>79</sup> and the maintenance of terms and conditions of employment during the maternity leave period, with the exception of pay, where the requirement is just the maintenance of a payment or an adequate allowance.
42. "Family friendly" policies are reflected too in the Parental Leave Directive 2010/18/EU, giving effect to the Framework Agreement on Parental Leave. The Framework Agreement lays down minimum conditions, cannot justify a lowering of the protection given to workers, and allows Member States to introduce rules more favourable to workers.<sup>80</sup> They require non-transferable parental leave of four months for parents or adopters of a child (which need not be paid);<sup>81</sup> time off for urgent family reasons;<sup>82</sup> and protection against detrimental treatment or dismissal for taking such leave, together with

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<sup>74</sup> Article 15 of the Equal Treatment Directive also confers a right to return to a job, or an equivalent post on no less favourable terms, after maternity leave, provisions found in regulations 18-18A of the Maternity and Paternity Leave Regulations 1999.

<sup>75</sup> Articles 1(3).

<sup>76</sup> Articles 4-7.

<sup>77</sup> Article 8 and 11.

<sup>78</sup> Article 9.

<sup>79</sup> Article 10.

<sup>80</sup> See Clause 1(1) and Clauses 8(1)(2).

<sup>81</sup> Clause 2(1).

<sup>82</sup> Clause 7(1).

associated rights.<sup>83</sup>

43. These provisions are for the present reflected in domestic law, through a combination of the EqA 2010, protecting against discrimination against pregnant women; the Maternity and Parental Leave Regulations 1999, as amended, providing for entitlements to maternity and parental leave; the Statutory Maternity Pay (General) Regulations 1986, Part XII of the Social Security and Contributions Act 1992 and other provisions, dealing with pay during maternity leave; provisions in ERA 1996, dealing with rights of time off for ante-natal care,<sup>84</sup> suspension from work on maternity grounds,<sup>85</sup> and time off for maternity, adoption and parental leave;<sup>86</sup> and the health and safety protections in the Management of Health and Safety at Work Regulations 1999.
44. The detail of these provisions is complicated, to say the least.<sup>87</sup> Stepping back, the key points are the following. First, in some instances, and in tension with other areas governed by EU law, domestic law goes further than EU law requires in the level of worker protection - for example, in the period for which qualifying employees are entitled to statutory maternity pay and in the right to paternity leave, which is additional to parental leave and which does not derive from EU law.<sup>88</sup> There is nothing in the relevant Directives which prevents this, however. Second, there is now a very extensive range of EU-guaranteed rights which are unlikely to be weakened at EU level and which constitute a protective level which workers in the UK cannot fall below - in fact the Commission is currently consulting on *strengthening* these provisions at EU level, including proposals for introducing special leave for fathers, carers' leave, more flexibility in working arrangements for parents and carers, and improving the implementation and enforcement of equal treatment

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<sup>83</sup> Clause 5.

<sup>84</sup> See ss 55-57B

<sup>85</sup> Part VII of ERA.

<sup>86</sup> See ERA Part VIII.

<sup>87</sup> See the IDS Handbook, *Maternity and Parental Rights* (2015).

<sup>88</sup> See ss 80-80E of ERA 1996 and the Paternity and Adoption Leave Regulations 2002.

rights.<sup>89</sup> Third, in the event of Brexit these rights become vulnerable to the political mood of the incumbent Government. The cost of some of these benefits to employers and especially the state<sup>90</sup> means that it would be naive to assume they will never be scrutinised for budgetary purposes.

45. **Part-time and Fixed-term Workers.** These two Directives, the Part-time Work Directive 97/81/EC and the Fixed-Term Work Directive 1999/70, both implement Framework Agreements between the social partners. They provide a degree of protection for part-time workers and those on fixed-term contracts, though it seems their objectives are also to encourage such forms of flexible working. The rights have been implemented in the UK, in a minimalist fashion, by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Neither Directive prevented or prevents the UK introducing rules more favourable to workers, and nor can they justify a lowering in the level of worker protection in the UK.<sup>91</sup>
46. Part-time workers are already protected under EU law because less favourable treatment of them compared to full-time workers will often amount to indirect sex discrimination since part-time workers tend to be overwhelmingly female, as many cases of the ECJ and domestic courts have recognised. So too may be other forms of 'atypical' working.<sup>92</sup> The Part-time Work Directive, giving effect to a Framework Agreement among the social partners, supplements that protection. Though some of the provisions have been criticised for their narrow effect - for example the apparent need for an actual comparable full-time worker engaged in the same or similar work<sup>93</sup> - the Directive does not require the group disadvantage based on sex necessary for indirect sex discrimination. It equally applies, for example, to a male part-

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<sup>89</sup> See the European Commission *Roadmap* (August 2015) and the Consultation Document on addressing the challenges faced by working parents and caregivers (11.11.2015 C(2015) 7754 final).

<sup>90</sup> Most of statutory maternity pay (103% in the case of small employers) is recoverable from the Revenue: see the Statutory Maternity Pay (Compensation of Employers) etc. Regulations 1994.

<sup>91</sup> See clause 6 of the Framework Agreement on Part-time Work and clause 8 of the Framework Agreement on Fixed-term Work.

<sup>92</sup> See *Allonby* [2004] ICR 1328.

<sup>93</sup> See clause 3(2)

timer worker in an all male workforce. Its broad effect is to require equal treatment, subject to the *pro rata temporis* principle, unless less favourable treatment of part-timers can be objectively justified - a relatively difficult test to meet.<sup>94</sup> Its effect is to give some important protection to a form of working which is often used to accommodate some sort of family life.

47. The potential bite of the Directive is shown by *O'Brien v Ministry of Justice* [2013] ICR 499 where, after reference to the ECJ, the Supreme Court held that fee-paid judges, though not "employees" as a matter of domestic law, were protected under the Directive because it applied to all "workers" and only excluded the genuinely self-employed.<sup>95</sup> Illustrating the high threshold of objective justification, the Court followed the guidance of the Advocate General and ECJ, that unequal treatment could only be justified by "precise concrete factors...and on the basis of objective and transparent criteria".<sup>96</sup> Saving of money by paying part-time workers less was not, according to the Supreme Court, sufficient because "the fundamental principles of equal treatment cannot depend on how much money happens to be available in the public coffers at any one particular time".<sup>97</sup>
48. The Fixed-term Work Directive works along similar lines, and aims to protect against discriminatory treatment of workers on fixed-term contracts and the abuse of successive fixed-term contracts. It gives this often precarious category of workers a general right not to be treated less favourably than a comparable permanent employee unless the difference in treatment can be objectively justified and requires the adoption of measures to prevent the abusive use of successive fixed-term contracts.<sup>98</sup> In *Del Cerro Alonso* [2008] ICR 145 the ECJ, emphasising that the Directive was a provision of social law which should be given a broad reach, rejected the argument of the UK Government that clause 4 of the Directive did not apply to cover discrimination in pay - a further illustration of the UK Government's stance to

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<sup>94</sup> See clause 4 and e.g. *Kutz-Bauer*, above, on the test for objective justification.

<sup>95</sup> See §§29-42.

<sup>96</sup> Supreme Court §46.

<sup>97</sup> See §§71-75.

<sup>98</sup> See Clauses 4 and 5 of the Annex.

rights of this sort, and an indication of what it would do in the absence of EU law. To the same end of enhancing the protection given by the Directive, the ECJ also made clear that objective justification for any difference in treatment required precise, and concrete factors based on objective and transparent criteria; the mere fact the difference in treatment was based on legislation or a collective agreement was not sufficient. The Directive not only forced the adoption of the 2002 Regulations, which mirror the Directive, but also led to various amendments to primary legislation to remove the discriminatory treatment of fixed-term workers in relation to statutory employment rights,<sup>99</sup> including the repeal of the commonly-used provisions which allowed employers to exclude fixed-term employees from the right to claim unfair dismissal and a redundancy payment.<sup>100</sup>

49. Both of these sets of Regulations are, I think, vulnerable to repeal or radical adjustment should the UK leave the EU. Earlier Conservative Governments, after all, vetoed earlier attempts to adopt Directives to introduce fair treatment for 'atypical' work, the Part-time Workers Directive was only extended to the UK when a Labour Government signed the Social Chapter,<sup>101</sup> and in both cases it was EU law alone which drove the national implementing legislation. Though I am not aware of any published suggestions thus far to remove them, Brexit would breathe new life into the deregulatory agenda with which the Regulations are in tension.
50. **Agency Workers Directive.** The Regulations implementing the Temporary Agency Work Directive 2008/104/EC of 19 November 2008, the Agency Workers Regulations 2010, are a still more obvious target for removal in the event of Brexit. The UK only dropped its opposition to the Directive after many years, when the CBI and TUC reached an agreement on agency workers in 2008, and has continued to protest about them since. Consistent with this stance, the Government enacted the Regulations to give the lowest level of protection it thought it could get away with which was compatible with EU

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<sup>99</sup> See regulation 11 and Schedule 2 to the 2002 Regulations.

<sup>100</sup> See s.197(1)(3) of ERA 1996; s.97 was repealed by the 2002 Regulations.

<sup>101</sup> For the history, see M Jeffrey (1998) 33 *Industrial Law Journal* 193.

law. For example, the Regulations require a 12-week qualifying period before an agency worker has a right to the same “basic working and employment conditions” as apply to comparable direct employees of the hirer,<sup>102</sup> they adopt a narrow definition of what counts as “pay” for the purpose of equal treatment; and they make maximum use of what is known as the ‘Swedish derogation’, to enable employers largely to avoid the requirement of equal pay.<sup>103</sup>

51. Whether this minimalist approach is consistent with the Directive has yet to be tested in the ECJ, and it is easy to criticise the limitations in the Directive (for example, it does not give agency workers a general right to equal treatment in relation to statutory rights, such as unfair dismissal) and the practical problems of workers enforcing their rights. But it is only because of the Directive that agency workers enjoy any degree of legal protection in the UK, however much the UK Government has sought to water this down. In the absence of the rights in the Directive - most importantly, to equal treatment in certain “basic working and employment conditions” (Article 5) and a right of access to “amenities or collective facilities” in the user undertaking (Article 6) - agency workers’ rights are minimal. Quite apart from their factual vulnerability to poor treatment, agency workers will often not have employment status under UK law and so do not benefit from the many legal rights conferred on employees only, such as unfair dismissal.<sup>104</sup> The recent decision in *Smith v Carillion* [2015] IRLR 467 shows the problem very clearly, where Mr Smith was held not to be a worker or employee of the company for which he worked, and so was not protected at the time against acts of anti-union victimisation.
52. In the event of Brexit, I expect that any Government with a deregulation agenda would repeal or at least radically reduce the effect of the Agency Workers Regulations. The hostility of many businesses to the Directive and the protection of agency workers is exemplified by the Beercroft report for the

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<sup>102</sup> See regulation 5.

<sup>103</sup> See regulations 10-12

<sup>104</sup> Owing to lack of control by the agency (see e.g. *Bunce v Postworth Ltd* [2005] IRLR 557)

last Government, which took the extraordinary step of suggesting the Government should break the law by refusing to implement the Directive.<sup>105</sup> Conversely, if an administration favourably disposed to protecting this vulnerable category of worker wished to introduce laws which gave a higher level of worker protection than the base rules in the Directive, it could do so.<sup>106</sup>

53. **Working Time.** The Working Time Directive, now 2003/88/EC, is another perennial target of attacks from UK Governments, perhaps especially those on the Right. Introduced as a health and safety measure under former Article 118A of the Treaty (now Article 153), this Directive too only lays down “minimum safety and health requirements for the organisation of working time” and does not affect the right of Member States to introduce provisions more favourable to workers. The Directive applies to every worker and contains, in broad terms, rights to daily and weekly rest, limits on maximum weekly working time, paid annual leave of at least four weeks, and measures to protect night workers. It is supplemented at EU level by Directives applying to workers who originally fell outside the scope of the Directive, such as workers in the transport sector and those at sea:<sup>107</sup> see e.g. the Working Time of Seafarers Directive 1999/63/EC and the Aviation Directive 2000/79/EC. WTR also implement the working time elements of Directive 94/33, limiting the working time of children.
54. Consistently opposed to the Directive, the UK Government brought proceedings challenging its legality in the ECJ,<sup>108</sup> only enacted legislation to comply with it (the Working Time Regulations 1998 (WTR)) two years after the deadline, and sought to exploit any possible loopholes in the

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and lack of a contract with the user undertaking (*James v Greenwich* [2008] IRLR 302).

<sup>105</sup> A Beecroft, *Report on Employment Law* (24.10.11), note 6 above.

<sup>106</sup> See Article 9 and Article 15.

<sup>107</sup> See the original Article 1(3) to Directive 93/104/EC, since amended by Directive 2000/34/EC. The 2000/34 Directive brought transport workers under the umbrella of the Working Time Directive but at the same time permitted more specific community requirements for certain occupations: see Article 14.

<sup>108</sup> See *United Kingdom of Great Britain v Council of the European Union*, Case C-84/94, [1996] ECR I-5755.

implementing legislation.<sup>109</sup> Since the reluctant introduction of WTR, UK Governments have campaigned for changes to the Directive at EU level (e.g. in relation to the rules on training of junior doctors and time spent on call), as well as criticising its effect. Recently, when the EAT ruled in *Bear Scotland* that holiday pay under WTR must include overtime payments, the Government immediately established a working group (without the involvement of any union or worker representatives) to consider the effect of the judgment, which led to the rapid introduction of legislation to protect employers against financial liability.<sup>110</sup> In the event of Brexit, substantial changes to or wholesale revocation of WTR is predictable.

55. The minimalist implementation of the Directive by the UK has led to numerous legal challenges in the ECJ which (I think) UK employers have invariably lost. Another source of criticism has been the use of individual agreements to avoid the limits on weekly working time. An empirical study in 2003, for example, found that about 90 per cent. of employees in the manufacturing, financial, engineering and legal sectors were subject to individual opt-outs, as well as almost 100 per cent. of managerial staff in the hotel and catering sector, and between 10-15 per cent. of staff in the health sector.<sup>111</sup>
56. Without the Working Time Directive there would be almost no legal protection against long hours of work in the UK, and no legal requirements for rest or paid holiday. The common law provides minimal protection. There is no implied contractual entitlement to holidays<sup>112</sup> and no implied right to be paid for them.<sup>113</sup> If excess working hours caused physical or psychiatric injury, this might give rise to a claim in tort based on the duty to take

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<sup>109</sup> Such as the derogation from weekly working time under Article 22 by means of individual agreements under regulation 4 WTR.

<sup>110</sup> Deduction from Wages (Limitation) Regulations 2014.

<sup>111</sup> See C Barnard, S Deakin and R Hobbs, "Opting out of the 48 Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK" [2003] 23 *Industrial Law Journal* 223.

<sup>112</sup> See *Campbell and Smith Construction v Greenwood* [2001] IRLR 588 (announcement of additional bank holiday on 31 December 1999 had no effect on workers' holiday entitlement).

<sup>113</sup> See e.g. *Morley v Heritage* [1993] IRLR 400.



reasonable care for health and safety or the corresponding duty in contract.<sup>114</sup> But proving breach is difficult, absent an actual injury, no cause of action arises. Though various international instruments to which the UK is a signatory recognise limitations on working time as human rights - see e.g. Article 24 of the United Nations' Universal Declaration of Human Rights of 1948 and Article 2 of the European Social Charter of 1961 - they are legally and practically irrelevant to a Government which is determined to ignore them, as shown by the position in UK law before WTR.<sup>115</sup>

57. In principle, then, if the UK left the EU and WTR were revoked, an employer could dictate whatever contractual terms it wanted about working time: express terms could require working many hours a work, could leave workers 'on call' for 24 hours a day or could confer no paid holiday at all. Prior to WTR, for example, it was not uncommon for workers to be granted no paid annual leave, as shown by some of the cases post-WTR. I do not share the view of some that the provisions of WTR enjoy a political consensus. At the very least I think a deregulatory-minded Government would make radical changes to the rules by which some time 'on call' counts as working time, to the rules limiting the maximum weekly hours, and to the level of pay and wide reach of the right to annual leave. But I suspect it would go much further than that: for glimpse of what is on the shopping list of those on the Right, see the private members' Bill currently before Parliament, the Working Time Directive (Limitation) Bill, sponsored by Christopher Chope MP, which seeks to allow employers to choose to opt out of working time rights generally and states that working time rules will not apply to doctors or health professionals, to on-call time not actually spent working, to travelling time or to how paid annual leave is calculated.<sup>116</sup>
58. **Collective rights.** Several EU Directives require collective consultation with unions or workers' representatives. It hardly needs to be said that the vision

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<sup>114</sup> See *Johnstone v Bloomsbury* [1991] ICR 269.

<sup>115</sup> But cf. some of the earliest employment legislation, which was about limitations on working hours: see e.g. the 1847 Act "to Limit the Hours of Labour and Young Persons and Females in Factories".

<sup>116</sup> The Bill, of course, will effectively be blocked owing to the Working Time Directive.

of labour relations underpinning these provisions is not one shared by many within the Conservative Party or some elements within the Labour Party. I think, then, that these provisions are highly vulnerable to removal or substantial change by a future Government. A signal of this intent was in the consultation preceding the proposed removal of 'gold plating' in the provisions on consultation on collective redundancies, in ss 188-197 TULRCA. While the document gave a nod to the desirability of workers being consulted over 'big issues', it made clear it was not the role of the law to 'dictate' this, but simply the task of government to 'create a flexible framework to support high quality consultation and to allow employers and employees' representatives to conduct it in a way that suits their unique circumstances'<sup>117</sup> - in other words, deregulation. Freed from the duty to implement the Directives, a Government with such an agenda might well repeal these measures.

59. To start at the beginning: prior to EU initiatives in this sphere, UK law lay down almost no duties on worker consultation, instead relying on free collective bargaining or, in the case of the now abolished wage councils, a form of statutory collective bargaining. The notable exception was the Safety Representatives and Safety Committees Regulations 1977, based on the model of union involvement favoured by the Robens Committee and which was expressed in s.2(6) of the Health and Safety at Work Act 1974 (HSWA), requiring consultation about health and safety where the employer recognised a union.
60. Those scant domestic requirements have now been greatly supplemented by several EU Directives. The earliest Directive at EU level, Directive 75/129 on collective redundancies, aimed to avoid employer strategies of 'social dumping'.<sup>118</sup> It was followed by others, the justifications for which include the higher productivity of companies with social dialogue, maintaining a balance between "flexibility" and security ('flexicurity' in the jargon), and

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<sup>117</sup> BIS, *Collective Redundancies: Consultation on Changes to the Rules* (June 2012), Foreword, p 4.

<sup>118</sup> The immediate cause was when in the 1970s AZCO, a multinational with employees in various European countries, decided it would make about 5000 workers redundant, worked out in

avoiding social dumping to the detriment of those Member States with established systems of social dialogue. They Directives cover the topics set out below (the Commission is currently consulting on consolidating Directives (1),(2) and (5) below):

- (1) Collective redundancies, originally Directive 75/129 and now Directive 98/59, requiring consultation where redundancies cross the numerical thresholds in Article 1 “in good time with a view to reaching agreement” about e.g. ways of avoiding, reducing or mitigating the dismissals, which must be completed before notices of dismissal are issued.<sup>119</sup> Information must be provided to assist in this process.<sup>120</sup> The Directive is implemented by ss.188-198 TULRCA, since amended by the coalition Government to remove ‘gold plating’ by SI 2013/763.
- (2) Consultation under the Acquired Rights Directive 77/187, now consolidated in Directive 2001/23/EC, the aim of which is to require employers to provide information and to consult in order to address the social consequences of economic change caused by transfer of undertakings. It too requires information and consultation by a transferee or transferor which envisages taking measures in relation to their employees “in good time...with a view to reaching agreement”.<sup>121</sup> The Directive is implemented domestically by, now, TUPE 2006.
- (3) The Framework Directive on Health and Safety 89/391/EEC, which provided the overarching umbrella for the later ‘daughter’ Directives, requires consultation with workers and/or their representatives “on all questions relating to safety and health at work”.<sup>122</sup> The supplementary measures include specific topics which must form the subject-matter of consultation, and require paid time off for training of safety

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which Member State the costs of redundancies were lowest, and sacked the workers there.

<sup>119</sup> See *Junk v Kuhnel* [2005] IRLR 310, ECJ

<sup>120</sup> Article 2(3).

<sup>121</sup> Article 7(2).

<sup>122</sup> Article 11.

representatives so that they can properly exercise their functions.<sup>123</sup> The Directive led to amendments to the Safety Representatives and Safety Committee Regulations 1977 to expand the subject of consultation.<sup>124</sup> It also led to the Health and Safety (Consultation with Employees) Regulations 1996, providing for consultation with workers or their representatives where employees are not represented under the 1977 Regulations by a recognised union.

- (4) The European Works Council Directive (EWC Directive), originally 94/45/EC, now 2009/38/EC, which was extended to the UK after the Labour Government signed up to Social Chapter. The Directive requires information and consultation in undertakings with at least 1000 employees and 150 in two member states<sup>125</sup> and has been implemented by the Transnational Information and Consultation of Employees Regulations 1999 (usually known as 'TICE'). The procedures are complicated but the requirements of the eventual consultation are not very rigorous - just the establishment of dialogue and the exchange of views<sup>126</sup> - and the 'default' provisions in Annex 1 of the Directive only require the European Works Council to meet with central management once a year.
- (5) The Information and Consultation Directive 2002/14/EC had a long genesis, dating back to 1980, and was vehemently opposed by UK. It is now implemented in the UK by the Information and Consultation of Employees Regulations 2004 (or 'ICE'). It applies only to establishments or undertakings employing at least 20 (establishments) or 50 (undertakings) in a Member State, and adopts a similar weak conception of consultation as that in the EWC Directive.<sup>127</sup> In the UK it is the 50 threshold which applies. The Directive requires, in broad

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<sup>123</sup> See Article 11(5), given effect in the UK by regulation 4(2) of the 1977 Regulations and regulation 7 of the 1996 Regulations.

<sup>124</sup> See regulation 4A.

<sup>125</sup> See Article 2(1).

<sup>126</sup> Article 2(1)(g).

<sup>127</sup> Article 2(g).

terms, a Member State to establish arrangements for information and consultation about the development of the undertaking, the circumstances surrounding employment in the undertaking, including in particular any threats to employment, and decisions likely to lead to changes in work organisation or contractual relations.<sup>128</sup> The UK has adopted a minimalist model, in which consultation need not be with elected representatives, let alone unions.<sup>129</sup>

The Directives require, too, measures to protect employee representatives against detrimental treatment for carrying out their functions, implemented by various provisions of domestic law.<sup>130</sup> The EU background and the need for effective sanctions informed the ruling in *Susie Radin v GMB* [2004] ICR 893, laying down the principle that damages for breach of collective consultation provisions<sup>131</sup> should be based on the seriousness of the employer's default, and should not be based on whether consultation would have made any difference. This decision led to many subsequent rulings giving relatively high awards of compensation for breach of the collective consultation provisions in TULRCA and TUPE.

61. Legitimate criticisms have been made about these Directives by unions and workers, about the extent to which they in fact involve unions in decision-making, fail to give priority to unions over other representatives, or lead to changes in management decision-making. The Directives do not require, for example, any recognition of unions, and nor is any priority given to unions in consultation at EU level.<sup>132</sup> Nor do they go so far as to require collective bargaining as understood in international<sup>133</sup> and domestic law,<sup>134</sup> though the

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<sup>128</sup> See Article 4.

<sup>129</sup> ICE regulation 14.

<sup>130</sup> See e.g. ERA ss 44, 47, 48, 100, and 103 and e.g. ICE regulations 30, 32.

<sup>131</sup> On the facts, the protective award under s.189 TULRCA

<sup>132</sup> See on this *Commission v UK* [1994] ICR 664, in which the ECJ held it was impermissible for consultation on collective redundancies or transfers of undertakings to be restricted to workplaces where unions were recognised.

<sup>133</sup> See e.g. ILO Convention C98 and the European Social Charter 1961, Article 6,

<sup>134</sup> See TULRCA s.179, which refers to "negotiations" over the specified matters, not consultation.

duty to consult “in good time and with a view to reaching agreement” imposes an obligation to negotiate, according to the ECJ in *Junk v Kuhnel* [2005] IRLR 310. But any weaknesses, from the viewpoint of workers and unions, of the EU provisions is not a constraint on national law: none of the Directives *prevent* a Member State introducing laws which are more favourable to workers.<sup>135</sup> If the law can play a useful role in this area, the Directives do not stop a national Government which wishes to intensify their reach and depth, and they provide a least a floor of compulsory information and consultation.<sup>136</sup>

62. **Acquired rights and TUPE.** I have already referred to the Acquired Rights Directive, implemented domestically by TUPE. Though its provisions are now familiar to employment lawyers, the Directive marked a radical break with the common law in the UK. At common law, a transfer of a business from A to B operated as a dismissal of the workers employed by A because the employment relationship is personal.<sup>137</sup> If the dismissal was with notice, the termination would not be a breach of contract; if it was without notice, damages would be restricted to lost earnings in the notice period. The contract of employment therefore provided employees with no sufficient remedies. Moreover, even if pre-TUPE these dismissals would amount to redundancies - the transferor, A, required fewer workers - this only entailed the pretty minimal statutory redundancy payments for those dismissed workers who had at least two years’ continuous employment.<sup>138</sup>

63. The Acquired Rights Directive gave much greater protection to employees. It is of particular importance in a commercial environment, especially in the

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<sup>135</sup> See Article 5 of Collective Redundancies Directive; Article 8 of the Acquired Rights Directive; Article 16(3) of the Framework Directive (whose object is to encourage improvements in health and safety: see Article 1(1)); EWC Directive Article 12(2) and 12(5) (non-regression); Information and Consultation Directive, Article 4(1) and Article 9.

<sup>136</sup> Apart from that, the duties in domestic law are minimal: recognised unions alone are entitled to some information for the purpose of collective bargaining under s.181 of TULRCA, but the duty to disclose is much circumscribed.

<sup>137</sup> See Lord Oliver in *Lister v Dry Forth Dock* [1989] ICR 341 at 363.

<sup>138</sup> See Part XI of ERA. The dismissals might be unfair owing to e.g. procedural unfairness, but in such a context it is unlikely that a fair procedure would have led to employees keeping their jobs, so any compensatory award would probably be minimal.

service sector, dominated by compulsory competitive tendering (partly, but not solely, as a result of EU law in this area). The Directive applies to a wide range of transfers of undertakings in both the public and private sectors, save for administrative reorganisations within public administrative authorities.<sup>139</sup> In a radical break with the common law, it requires the compulsory transfer of employees, with their existing terms and conditions intact, to the transferee: in effect a continuation of the employment relationship.<sup>140</sup> The only exception to this is old-age, invalidity or survivors' benefits under company pension schemes;<sup>141</sup> but this provision did not prevent the transfer of the right to a payment of full pensions on redundancy before normal retirement age, once a common feature in the public sector.<sup>142</sup> The Directive protects employees against variations of their terms of employment owing to the transfer.<sup>143</sup> Employees are also protected to a degree against dismissals because of a transfer, save for economic, technical or organisational reasons "entailing a change in the workforce".<sup>144</sup> Duties of information and consultation in Article 7, referred to above, supplement these duties.

64. There are recent signs that the ECJ, in times of recession, is watering down some of the protection which it formerly treated the Directive as giving to employees. In *Alemo-Herron v Parkwood* [2013] ICR 1116 it held that employees whose terms and conditions were determined by a collective agreement while in the public sector were not entitled to the benefit of collectively-agreed wage rises which took place after they transferred to a private sector employee, who was not a party to the collective agreement. In doing so, it ruled that the objective of the Directive was not only to protect employees' rights but also to strike a fair balance between the rights of

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<sup>139</sup> Article 1.

<sup>140</sup> Article 3. This is subject to an exception if the employee objects to being transferred, implemented by regulation 5(4) of TUPE to give effect to the decision of the ECJ in *Katiskas* [1993] IRLR 179, recognising the fundamental right of an employee to choose for whom he works.

<sup>141</sup> Article 3(4).

<sup>142</sup> See *Beckmann v Dynamco Whicheloe* [2003] ICR 50.

<sup>143</sup> See *Daddy's Dance Hall* [1988] IRLR 315 and *Martin* [2004] IRLR 74. It remains contentious whether TUPE 2006 correctly give effect to these judgments.

<sup>144</sup> See Article 4. These words provide a significant limitation on the power to dismiss: see *Manchester College v Hazel* [2014] ICR 989.

employers and employees. Having regard to the right to conduct a business in Article 16 of the EU Charter, the ECJ determined that a 'dynamic' approach to collective agreements was precluded by the Directive - a rare example of a ruling which prevented a Member State from adopting an approach more generous to employees.

65. The Government rushed through amendments to give effect to *Alemo-Herron* in the same legislation designed to remove some elements of 'gold plating' from TUPE.<sup>145</sup> This itself suggests TUPE and the Directive are not warmly embraced by the UK Government, and I do not share the view of some that businesses will be supportive of it. I think many businesses would welcome the repeal of or radical changes to TUPE, especially those large corporations which are dominant in contracting-out exercises (though I would be interested in the views of others on this issue). Potential targets include, I think, collective consultation, rules restricting harmonisation of terms post-transfer, and even the liabilities for transfer-related dismissals. While the decision in *Alemo-Herron* is regressive to workers' rights and collective bargaining, Brexit offers the real possibility, highly detrimental to many precarious workers, of a return to the position in which transfers terminated employment *tout court*, with no more than the low levels of redundancy pay payable to those with sufficient continuity, or in which an employer can readily adjust terms downwards post-transfer by the simple device of dismissal and re-engagement.
66. **Health and Safety.** The introduction of Article 118A (now replaced and modified by Article 153 TFEU) by the Single European Act in 1986 led to many important EU Directives in the field of health and safety at work.<sup>146</sup> The ECJ has given that Article a wide interpretation of what counts as 'health' so allowing Directives on working time to be introduced under it.<sup>147</sup> The Framework Directive 1989/391, which outlined the general principles to be

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<sup>145</sup> See regulation 4A, inserted by SI 2014/16.

<sup>146</sup> The history is set out in J Clarke, *Redgrave's Health and Safety* (LexisNexis).

<sup>147</sup> See *UK v EU Council* [1997] IRLR 30, §15.



applied to encourage improvements in the health and safety of workers,<sup>148</sup> including a general duty to ensure workers' safety and health "in every aspect related to work" as well as worker participation,<sup>149</sup> was followed by several important 'daughter' Directives. The key ones are:

- (1) The Temporary Workers Directive 91/383/EEC, requiring the same level of protection for agency workers and fixed-term workers as apply to permanent employees - an early measure extending regulation to 'atypical' workers;
- (2) The Workplace Directive 89/654, laying down important rules about the safety of workplaces;<sup>150</sup>
- (3) The Work Equipment Directive, now 2009/104/EC, by which employers must ensure work equipment is suitable and can be used without risk to workers' health and safety;
- (4) The Personal Protective Equipment Directive 89/656/EC, by which PPE must comply with EU safety standards and must be appropriate for the risks involved.
- (5) The Display Screen Equipment Directive 90/270/EEC, which lays down health and safety requirements for display screen equipment.
- (6) The Manual Handling Directive 90/269, laying down a structured procedure to adopt to address the risks from manual handling.

67. These Directives are supplemented by many others addressing specific kinds of risk or worker, too numerous to list here.<sup>151</sup> They are generally acknowledged to have led to improved standards of health and safety at work

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<sup>148</sup> Article 1(1).

<sup>149</sup> See Articles 5, 11.

<sup>150</sup> Supplemented by others, such as Directive 92/57 on temporary or mobile construction sites.

<sup>151</sup> See *Redgrave's Health and Safety* for the complete list.

and to have improved workers' prospects of success in personal injury litigation. As with most other provisions of EU social law, they specifically permit Member States to introduce provisions which are more favourable to workers.<sup>152</sup> In the important case of *Stark v Post Office* [2000] ICR 1013, the Court of Appeal emphasised that the Directives could not lead to a lowering of existing standards under national law: their aim is only to improve safety standards, just as courts have held in other cases.<sup>153</sup> A similar effect is seen in the recent Supreme Court judgment in *Kennedy v Cordia* [2016] 1 WLR 597 where, in allowing an injured care workers appeal, the Court paid much attention to the Directives' goal of improving health and safety, including the general principles of risk assessments and the need to protect employees against risks in every aspect related to work.

68. A recent development shows the opposition of the last Government to these standards when they result in perceived unfair burdens on employers. The Directives were all implemented by domestic regulations under the HSWA and, formerly, a breach of any of these (and other) regulations which caused personal injuries gave rise to a potential civil action for damages unless the regulations stated otherwise.<sup>154</sup> In 2013, in a move to reduce "burdens on business", the coalition Government repealed the right to an individual civil action, despite this going further than the recommendation of its own independent expert.<sup>155</sup> As a result, from April 2013, health and safety regulations are enforced exclusively by criminal sanctions (which already existed anyway), following prosecutions which in general terms only the

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<sup>152</sup> Framework Directive, Article 1(3).

<sup>153</sup> See e.g. *Robb v Salamis* [2007] ICR 175, per Lord Hope at §15.

<sup>154</sup> See s.47(2) HSWA 1974. The only significant regulations which formerly excluded civil liability were the Management of Health and Safety at Work Regulations 1999, but this exclusion was removed in relation to employees in 2006: see regulation 22, as amended.

<sup>155</sup> See s.69 of the Enterprise and Regulatory Reform Act 2013, amending s.47 HSWA. The repeal of civil liability followed the report of Professor Löfstedt, *Reclaiming Health and Safety for All* (November 2011), commissioned by the government to look into the scope for reducing the burden of health and safety regulation on business. As Professor Löfstedt pointed out in his later report, *Reclaiming Health and Safety for All: A Review of Progress One Year On* (January 2013), the removal of civil liability was more "far-reaching" than he anticipated (p 11). The Government justified its response by the need to remove strict liability when an employer was not at fault and to tackle the "perception [*sic*] of a compensation culture": see Impact Assessment, *Strict Liability in Health and Safety Litigation*, 11 June 2012, at §17-18.

Health and Safety Executive (HSE) or the Director of Public Prosecutions, and not an individual, can bring.<sup>156</sup> Removing civil liability for breach can only have a detrimental impact on workers' health and safety in general and on personal injury claimants in particular. It is not clear if this move is compatible with EU law on effective sanctions which are equivalent to infringements of analogous provisions of national law.<sup>157</sup>

69. This legislative development serves to illustrate, first, that it can no longer be assumed that there is a political consensus about improving health and safety standards at work, despite the long history of legislation in this area which has mostly been left intact by successive Governments (or in some cases introduced by Conservative administrations, including some of the Factories Acts and the HSWA itself). Second, and linked to the first point, if the last Government were not constrained by EU law to provide *some* effective remedy for breach of the Directives - which it now purports to do so by criminal law alone, without civil claims - it may well have taken the further step, consistent with its logic of reducing the 'perception' of burdens on business by repealing in whole or in part some of the health and safety regulations which implement EU law. In this light I think that *many* of the regulations which implement duties in EU health and safety Directives are both legally and factually vulnerable in the event of Brexit, to be replaced largely by a common law duty of care alone.
70. **Rights on Insolvency.** Under the Insolvency Directive, now consolidated in Directive 2008/94/EC, each Member State is required to guarantee employees the payment of outstanding claims arising out of contracts of employment or the employment relationship against employers who are in insolvency.<sup>158</sup> This means that the State must pay the sums owing to employees whose employer cannot pay owing to insolvency. Once again, implementation of the Directive cannot be a means of reducing the existing level of protection of workers, and

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<sup>156</sup> See ss 38-39 HSWA.

<sup>157</sup> See above and Article 47 of the EU Charter; but cf. *R (URTU) v Secretary of State for Transport* [2013] IRLR 890, CA: sufficient to have criminal sanctions only for breach of Road Transport Working Time Directive.

<sup>158</sup> See Article 3.

nor does the Directive prevent the UK introducing rules which are more favourable to workers.<sup>159</sup> Member States may (i) limit the period of pay which guaranteed, but subject to a minimum of eight weeks' remuneration;<sup>160</sup> and (ii) set a ceiling on the payments, provided this is compatible with the social objectives of the Directive. Article 8 of the Directive separately requires the guaranteeing of pension liabilities, which has proven to be very important in protecting the rights of workers in the UK: see *Robins v Secretary of State For Work and Pensions* [2007] ICR 779, ECJ, holding that the then state guarantee under the Financial Assistance Scheme of 49% of pension benefits was insufficient protection.<sup>161</sup>

71. To implement these provisions, Chapter VI of Part XI of ERA 1996 allows an employee to claim against the Secretary of State for a redundancy payment when the employer is insolvent and the correct sum has not been paid. In addition, the Financial Assistance Scheme protects the pensions of employees of insolvent companies. Lastly, Part XII of ERA gives an employee whose employment has been terminated the right to apply to the Secretary of State for certain debts where his employer has become insolvent.<sup>162</sup> Mirroring the provisions of the Directive, the guaranteed period of pay is limited to eight weeks and there is a ceiling of £475 on the amount payable for each week.<sup>163</sup> These provisions are very important in practice: it is very common where a plant closes following the insolvency of an employer for the workers to recover significant sums in respect of arrears of pay against the state, claims which would be worthless against the employer. As I write, for example, it has been reported that the steel workers who were made redundant at Redcar will receive £6.25 million from the Government because of the failure of their insolvent employer to consult them properly in relation to collective redundancies.<sup>164</sup> In the event of Brexit, when there will be nothing to underpin these duties, I think the domestic provisions will be vulnerable. Given the

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<sup>159</sup> Article 11.

<sup>160</sup> Article 4(2).

<sup>161</sup> See similarly *Hogan v Minister for Social and Family Affairs* [2013] 3 CMLR 27.

<sup>162</sup> See s.182.

<sup>163</sup> See ERA ss 184, 186.

<sup>164</sup> Protected awards are guaranteed under s. 184 of ERA.

current climate of austerity, a future Government may be very inclined to decide that these are losses which it should not bear.

72. **Written Terms of Employment.** The Written Statement Directive 91/533/EEC which, in the interests of protecting workers by providing them with sufficient information about their rights, requires an employer to provide “every paid employee ”with written details of their essential conditions of service.<sup>165</sup> The Commission is currently consulting about changes to the Directive owing to the growth in forms of work other than standard employment. UK law on this pre-dated the Directive but it now guarantees the rights in Part I of ERA.
73. **Data Protection at Work.** The Data Protection Directive 95/46/EC, which is not restricted to the workplace, drove the enactment of the Data Protection Act 1998. That Act protects the processing of personal data, including sensitive personal data such as political opinions, trade union membership, health and sexual life.<sup>166</sup> Its detail is complicated but the key point is that it plays an important role in protecting workers against infringements of a broad conception of private life, including e.g. by monitoring their communications at work, as shown by the detail of the of the Information Commissioner’s *Employment Practices Data Protection Code*, issued under s.51(3) of the Act. The action which led to the public exposure of blacklisting in the construction industry, for example, was taken under this Act,<sup>167</sup> and if the Act were in force at the relevant time it would have provided some means of obtaining compensation for blacklisted workers.<sup>168</sup> The Directive will be replaced in the near future with a new Data Protection Regulation, albeit based on similar principles.<sup>169</sup> While compliance with EU data protection legislation gives rise to many difficult issues beyond employment (e.g. where data are transferred

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<sup>165</sup> Article 1.

<sup>166</sup> See ss 1-2.

<sup>167</sup> Following a search by the Information Commissioner, the chief officer of the ‘Consulting Association’, Ian Kerr, was fined £5,000 for breach of the DPA 1998, and was also issued with an enforcement notice under s.40 DPA 1998, as were 14 construction companies, to stop them using the database: see report of the Scottish Affairs Committee of the House of Commons (part of the UK Parliament) published on 16 April 2013, *Blacklisting in Employment: Interim Report*, pp 12-13.

<sup>168</sup> The earlier Act, the Data Protection Act 1984, did not apply to paper systems, as were used by the Consulting Association, and the DPA 1998 only came into force in March 2000.

abroad), the protection it gives against e.g. monitoring at work or the making of subject access requests is hardly welcomed by businesses.

74. **The EU Charter.** The EU Charter held out the prospect of its being a significant source of workers' rights. Title IV, in particular, entitled 'Solidarity', contains a list of key rights relevant to workers, such as rights to information and consultation, rights to collective bargaining (including to take strikes), protection against unjustified dismissal, and right to fair and just working conditions. But, quite apart from the issue of whether Title IV applies to the UK owing to Protocol 30,<sup>170</sup> in practice it has turned out to be much less important than many unions thought or hoped. The ECJ has greatly limited its effect and to date has not given the rights an independent existence by which they can be directly enforced in the absence of further provisions of EU law. The net result is that in this context to date the EU Charter has not added much if anything to the protection already provided by EU Directives: see e.g. *Association de Médiation Sociale* [2014] IRLR310 (Article 27, on workers' right to consultation, did not confer enforceable rights on individuals); *Poclava* [2015] IRLR 453 (Charter only addressed to Member States and did not confer right on individuals not to be dismissed for unjustified reason).<sup>171</sup> Conversely, the ECJ relied on Article 16, which refers to the "right to conduct a business", in *Alemo-Herron* (above), to reduce the protection given by the Acquired Rights Directive.
75. The one important exception to this is Article 47 of the Charter, which is in Title VI not Title IV, and which grants everyone a right to a effective remedy if their EU rights are violated. In *Bernkharbouche v Sudan* [2015] ICR 793, the Court of Appeal held that this right was horizontally effective and so could be used to disapply inconsistent national legislation. As a result it permitted embassy staff to bring employment claims based on EU law even though the State Immunity Act would deny them the right to bring claims as a matter of domestic law. (Note, too, that the Charter may restrict the UK Government's

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<sup>169</sup> Commission's document at [http://europa.eu/rapid/press-release\\_IP-15-6321\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6321_en.htm)

<sup>170</sup> See on this C Barnard, *EU Employment Law*, above, at pp 38-33.

<sup>171</sup> See too Advocate General Trstenjak in *Dominguez* [2012] IRLR 321, contending the same

freedom to depart from the ECHR if it introduces a Bill of Rights in place of the HRA 1998, at least in the sphere of EU law, because it guarantees rights similar to those in the ECHR.<sup>172</sup> But this is more about civil and political rights, and less about labour rights.)

76. **Free Movement.** I only highlight free movement rights here since they are not usually categorised as social rights. The right to free movement of workers is set out in Article 45 TFEU, which equally prohibits any discrimination based on nationality between workers<sup>173</sup> and so supplements the protection of the Race Directive. That Directive does not apply to discrimination because of nationality,<sup>174</sup> so that the nationality discrimination to which the domestic EqA 2010 applies<sup>175</sup> is partly underpinned by Article 45.
77. **Economic freedoms and Posted Workers.** The Posted Workers Directive 96/71/EC (PWD), which I mentioned in the Introduction, gives a degree of protection to workers posted from one Member State to another. It guarantees the posted workers certain listed terms and conditions (including working time rules, minimum wage rates, health and safety standards and provisions on non-discrimination) that are applicable to workers in the State to which they are posted, provided these are laid down by (i) law, regulation or administrative provision or (ii) in relation to Annex 1 activities (mainly construction) collective agreements or arbitration awards which have been declared ‘universally applicable’.<sup>176</sup> The PWD permits this to happen in legal systems such as the UK’s by the State adopting standards in generally applicable sectoral, geographical or national collective agreements.<sup>177</sup> A Member State may in addition opt to include terms and conditions in ‘universally applicable’ collective agreements in sectors other than

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applied to the right to paid annual leave in Article 31 of the Charter.

<sup>172</sup> See especially Article 52.

<sup>173</sup> See *O’Flynn* [1996] ECR I-2617, which has been referred to since in the context of indirect discrimination.

<sup>174</sup> See Article 3(2).

<sup>175</sup> See s.9.

<sup>176</sup> See Article 3(1).

<sup>177</sup> See the definition of ‘generally applicable’ collective agreements in Article 3(8).

construction if it can show a sufficiently pressing social reason.<sup>178</sup> It is now supplemented by a Directive intended to enhance the enforcement of the PWD by allowing e.g. workers in construction to recover under-payments of the national minimum wage from contractors other than their direct employer.<sup>179</sup> In addition, there are recent proposals from the Commission to amend the PWD in future to address unfair practices and to extend collective agreements 'universally applicable' to all sectors, not just construction.<sup>180</sup>

78. Although the PWD confers rights on posted workers and is said not to prevent national legislation which is more favourable to them,<sup>181</sup> in light of its intersection with the economic freedoms in the Treaty, such as freedom of establishment and freedom to provide services in Articles 49 and 56 TFEU respectively, it has in practice come to be treated as a ceiling and not a floor of rights. This is a long and convoluted story and involves not just the economic freedoms but also the rules on public procurement, now set out in principally Directive 2014/24/EU.<sup>182</sup> It is still being worked through by the ECJ, as shown by its recent ruling in *Regiopost* [2016] IRLR 125. But, broadly, the result is that in some circumstances the economic freedoms in EU law permit commercial organisations to resist conditions in public contracts requiring contractors to comply with labour standards, such as pay rates, which go beyond those set out in Article 3 of the PWD (for example, compliance with fair rates of pay which are higher than a statutory minimum wage<sup>183</sup>). By the same token, the Directive has limited the power of unions to take collective action in order to press for such higher standards. This is illustrated by *Laval* [2008] IRLR 160 where the ECJ, despite saying that the right to take collective action was a fundamental right under EU law,<sup>184</sup> held it could not justify strike action by Swedish trade unions in the building sector aimed at compelling a

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<sup>178</sup> See Article 3(10) and *Commission v Luxembourg* [2009] IRLR 388 at §§48-55.

<sup>179</sup> See the Posted Workers Enforcement Directive 2014/67/EU, not yet implemented in the UK: see the consultation, BIS, *Implementing the Posted Workers Enforcement Directive* (July 2015).

<sup>180</sup> See the Commission Proposal of 8.3.16 (COM)(2016) 128 final.

<sup>181</sup> See Article 3(7).

<sup>182</sup> See too in the context of entities in the water, energy, transport and postal services, Directive 2014/25/EU.

<sup>183</sup> See especially *Ruffert* [2008] IRLR 467.

<sup>184</sup> See §91.



Latvian company to sign a collective agreement providing for rates of pay which were higher than those laid down in national legislation.<sup>185</sup> Such action, according to the ECJ, was an interference with the freedom to provide services which could not be justified because it sought to enforce higher wage rates than those required by Article 3 of the PWD.

79. Other cases show the same tendency. Thus, in *Commission v Luxembourg* [2009] IRLR 388 the ECJ held that Luxembourg laws implementing the PWD could not require contractors automatically to adjust pay in accordance with the cost of living or to abide by collective agreements which had not been declared universally applicable, because these rules went further than Article 3 of the PWD required.<sup>186</sup> Similarly, in *Rüffert* [2008] IRLR 467 a regional authority could not rely on regional legislation requiring contractors to pay workers in Germany (on the facts employed by a Polish subcontractor) in accordance with the minimum wage laid down in a sectoral collective agreement which had not been declared of universal application within the meaning of the PWD. But there are fine lines to be drawn here. For example, recently in *Regiopost* the ECJ distinguished *Rüffert* in not striking down a German regional law which provided that public contracts would only be awarded to contractors who paid its workers E8.50 gross per hour, a rate which did not apply in the private sector.<sup>187</sup> Although there was no national minimum wage in Germany at the time, because the requirement was laid down in legislation which applied to all public contracts it met the requirement of Article 3 PWD, and so was a permissible social consideration to take into account under public procurement rules.<sup>188</sup> The critical difference between the cases was that in *Regiopost* the regional law *itself* set the minimum wage generally applicable to public contractors, whereas in *Rüffert* the regional law merely referred to rates set out in collective agreements.<sup>189</sup>

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<sup>185</sup> See too *Viking* [2008] ICR 741.

<sup>186</sup> Cf. *Sähköalohe* [2015] IRLR 407, where a union could bring an action to force contractors to pay posted workers in accordance with a collective agreement which was universally applicable in Finland.

<sup>187</sup> See judgment at §§13-14.

<sup>188</sup> See §§73-77 of the judgement.

<sup>189</sup> In addition, in *Regiopost* the ECJ referred to Article 26 of the, then, Public Sector Procurement Directive 2004/18, allowing the use of 'social considerations' in public contracting - a

80. *Regiopost* may be the sign of a change in direction of the ECJ, towards allowing States and local authorities greater freedom to lay down compulsory wage rates applicable to public contracts, at least so long as these are laid down in some form of ‘law’, whether national or regional. This freedom is only likely to be increased by the new Public Procurement Directive 2014/24/EU, which expressly empowers contractors to reject bids which do not comply with obligations in social and labour law established by, among others, national labour law, collective agreements and various ILO Conventions.<sup>190</sup> But in any case it is increasingly clear that provided the contract rules comply with the Posted Workers Directive, they will be permissible.<sup>191</sup> As a result, first, the EU economic freedoms do not prevent a Member State laying down an increased mandatory rate of minimum pay in national law applying to all domestic workers, and therefore extending to posted workers<sup>192</sup> (an example will be the forthcoming introduction of the national Living Wage, increasing the rate of the national minimum wage). Second, provided it used ‘law’ to do so, a regional authority could probably lay down fair wage rates applicable to all public sector contractors, just as the regional authority did in *Regiopost*. Third, EU law would not prevent a future UK Government favourably disposed to collective bargaining deciding to make wage rates set out in sectoral collective agreements legally binding on all contractors in that sector,<sup>193</sup> a power which will be enhanced if the current Commission proposals lead to legislation extending the reach of ‘universally applicable’ collective agreements beyond the construction sector.<sup>194</sup> It is worth pointing out that even before the *Regiopost* judgment and in the absence of

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provision not in force at the time of *Riuffert*.

<sup>190</sup> See Articles 18(2) and 56 and Annex X (there are similar provisions in the Utilities Directive 2014/25/EU). See on this Abby Semple, *A Practical Guide to Public Procurement*, pp 106-110, and, on the former Directive 93/37/EEC, Case C225/98, *Commission v France* [2000] I-ECR 17445 (permissible to include award criterion relating to combatting unemployment in local area).

<sup>191</sup> See recital (37) to the 2014 Public Procurement Directive.

<sup>192</sup> See Article 3 of the PWD.

<sup>193</sup> The most obvious means would be to give effect to the rates in national laws, by making the relevant rate a legal requirement in the sector or binding on all public contractors; alternatively, and less straightforwardly, the UK could make use of the procedure for declaring such agreements ‘universally applicable’ in the PWD: see Article 3(8) and (10) of the PWD (but cf. *Commission v Luxembourg*, above, at §§49-55).

legally prescribed rates of pay, the Scottish Government made greater use of guidance to require contractors to observe fair labour terms.<sup>195</sup>

## **(2) Status of EU-derived Rights After Brexit**

81. The other questions addressed in the Advice can be dealt with more shortly. The second question is the status of EU rights after a Brexit and the decisions which a UK Government might take to repeal existing labour rights protected by EU law. The answer to this question depends on too many contingencies to give anything more than general guidance. There is, so far as I am aware, no precedent for the kind of radical overhaul of laws which would potentially flow from Brexit.
82. The legal effect of Brexit would not be immediately to deprive the European Communities Act 1972 (ECA 1972) of legal effect. In the first place, the withdrawal process itself would take two years, the time to negotiate a withdrawal agreement if sooner or a longer period if that were agreed unanimously within the Council, under Article 50 TEU. In principle, if the ECA 1972 were simply repealed, all delegated legislation made under it would be revoked by implication in the absence of an express saving in the repealing legislation. This is because a repeal is based on the fiction that the Act never existed: see *Watson v Winch* [1916] 1 KB 688 per Lord Reading CJ - which has been considered since but not doubted.
83. But it is almost unimaginable that the UK Government would simply repeal the ECA 1972 because that would lead to legal and commercial chaos. For example:
  - (1) The UK would, presumably, need to enter into some form of trading agreement with the EU as to the nature of its future trading relationship, just as other States such as Norway or Switzerland which are not members of the EU have done. The terms of that trading

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<sup>195</sup> See s.29 of the Procurement Reform (Scotland) Act 2014 and the *Statutory Guidance on the Selection of Tenderers and Award of Contracts* (2015).

relationship are likely to dictate what provisions of EU law the UK would nonetheless still comply with. On the Norway model, where Norway signed the treaty establishing the European Economic Area (EAA), compliance is still necessary with EU social law which bears upon EAA activity,<sup>196</sup> whereas the Swiss model is based on bilateral trade agreements.<sup>197</sup>

- (2) Some provisions giving effect to EU law are set out in primary legislation; examples are the protections against discrimination in the EqA 2010 and various sections of ERA which implement EU law, such as those protecting employees against detriments or dismissal in relation to EU-derived rights.<sup>198</sup> Those provisions would be unaffected by any repeal of the ECA 1972.<sup>199</sup>
- (3) Moreover, many regulations introduced to implement EU law were not introduced under, or exclusively under, the ECA 1972. To illustrate with examples: the Working Time Regulations were made under the ECA; the Fixed-Term (Prevention of Less Favourable Treatment) Regulations were made under the Employment Act 2002, even though they implement an EU Directive, and many of the health and safety regulations implementing Directives were made under s.15 HSWA;<sup>200</sup> but TUPE 2006 were made under both the ECA 1972 and s.38 of the Employment Relations Act 1999, and the Management of Health and Safety at Work Regulations 1999 were made under both s.2 ECA and s.15 HSWA, as were the Agency Worker Regulations 2010; and so on. Thus, repeal of the ECA 1972 would not affect those Regulations made exclusively under another Act. More complicated still, where Regulations are passed under *both* the ECA 1972 and another statutory

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<sup>196</sup> Recent Directives state where they are relevant to the EAA: see e.g. the EWC Directive and the Parental Leave Directive, stating after the title “Text with EAA Relevance”.

<sup>197</sup> See Edward and Lane, *European Union Law* (2013) pp 902-905.

<sup>198</sup> See, for one example, the health and safety protections in ss 44 and 100, giving effect to the Framework Directive in this sphere. There are many, many others.

<sup>199</sup> Though adding to the complexity, in Northern Ireland some discrimination law is in secondary legislation.

<sup>200</sup> See e.g. the Provision and Use of Work Equipment Regulations 1992.

power, very difficult issues would arise if the ECA were repealed. A court would have to consider, I think, whether particular provisions could have been made under the domestic statute, such as s.15 HSWA, despite the repeal of the ECA. To take an example: which parts of the Agency Workers Regulations or the Management of Health and Safety at Work Regulations could have been made under s.15 HSWA and so would still be lawfully made, and which could not?

- (4) There will be devolution issues to consider, to the extent that some regulations or statutes fall within the competence of the Scottish Parliament or Welsh Assembly or where legislation in Northern Ireland is different (a huge topic which I cannot go into here).
- (5) It would create enormous commercial uncertainty if ECA were repealed or regulations were simply revoked without any run-in period or without any explanation of the operation of transitional provisions. The effect of repeal of legislation, in the absence of specific transitional provisions, on existing transactions, rights and proceedings is extremely complicated, to say the least.<sup>201</sup> Suppose TUPE were simply revoked post-Brexit, to take one example. Businesses and lawyers would want to know, for instance, from what date precisely a transfer was no longer governed by TUPE, how this affected rights of employees who transferred in the past under TUPE, to what extent e.g. a dismissal in the future because of a past transfer would be governed by the now revoked legislation, what was the effect on claims already issued, and so on. These questions are only some examples but they illustrate the kinds of impenetrable problems which would arise from revoking legislation without including detailed transitional provisions.

84. For all these reasons I cannot imagine any Government would simply revoke wholesale EU-derived employment rights, or all the Regulations made under

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<sup>201</sup> See the Interpretation Act 1978 s.16, described by Bennion as “notoriously opaque drafting”, which summarises the complicated effect of the repeal of an Act in the absence of explicit transitional provisions. The same rules apply to delegated legislation, such as statutory instruments: see s.23 of that Act.

the ECA 1972, no matter how hostile it was to them. I expect that the process would occur gradually. There already exist models for how this might happen. For example, s.37 of the Deregulation and Contracting Out Act 1994 gives a power to repeal or revoke health and safety regulations, subject to consultation with certain bodies, and provides that the revoking regulations may contain appropriate transitional or savings provisions. Another model is in Part I of the Legislative and Regulatory Reform Act 2006, by which a Minister may introduce statutory instruments to remove 'burdens' resulting from legislation including primary legislation.<sup>202</sup> The relevant order may include consequential or transitional provisions.<sup>203</sup> The order cannot affect matters within the competence of the Scottish Parliament or Welsh Assembly.<sup>204</sup> There are provisions by which the Minister must consult certain persons, including those representative of interests substantially affected by the proposals.<sup>205</sup> This is the sort of statutory means that I think could be adapted to repeal, revoke or modify EU-derived employment rights. It would give the Government a power to act quickly and to pick and choose which parts of legislation it wanted to remove.

### **(3) Implications for Inspectorates and for Civil Justice Processes**

85. The third question in my advice is the potential effect of Brexit on inspectorates such as the HSE and civil justice processes.
86. Many EU Directives in the employment field expressly require effective remedies for breach. For example, Article 7 of the Racial Discrimination Directive 2000/43/EC states:<sup>206</sup>

Member states shall ensure that judicial and/or administrative procedures, including where they consider it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by the

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<sup>202</sup> See s.1(1)(2)(6) and s.12.

<sup>203</sup> See s.1(8).

<sup>204</sup> See ss 9, 11.

<sup>205</sup> See s.12.

<sup>206</sup> See similarly Article 9 of the Framework Directive 2000/78/EC; Article 17 of the Sex Directive 2006/54.

failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

To ensure practical effectiveness, the Directives protecting against discrimination also reverse the burden of proof, require remedies for victimisation and require effective sanctions.<sup>207</sup> In any case, as set out above, the duty to provide effective remedies in the field of EU law is now explicit in Article 19 TEU and Article 47 of the EU Charter and is a general requirement of EU law.

87. The means for giving effective remedies and sanctions is, however, generally a matter for each Member State, provided that they are effective, proportionate and dissuasive (the principle of effectiveness) and provide analogous procedural rules and penalties as apply to similar infringements of national law (the principle of equivalence).<sup>208</sup> It is not a requirement that any particular procedure or remedy is available, though if civil compensation is the route chosen the compensation must be adequate. These rules provide general constraints on how Member States implement EU law and have been summarised above.
88. Until the recent changes removing civil liability for breach of health and safety regulations, the enforcement of health and safety regulations implementing EU Directives (and other health and safety regulations in the work sphere) was three-pronged: (i) civil claims for damages under s.47 HSWA; (ii) criminal prosecutions under ss 33-42 HSWA, taken by the DPP or the HSE; and (iii) enforcement action by the HSE issuing enforcement and prohibition notices under ss 18-26. Now only the last two survive (coupled with the possibility of actions based on directly effective provisions of Directives but only against emanations of the state). Under the Framework Directive 89/391, Member States are required to take the steps to ensure employers are subject to the legal provisions, and similar duties are contained in each 'daughter'

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<sup>207</sup> See e.g. Articles 7-9 and 15 of the Race Directive; Articles 9-11 and 17 of the Framework Directive.

<sup>208</sup> For a recent examination of the principles, see *R (URTU) v Secretary of State for Transport*

Directive.<sup>209</sup> The Framework Directive, too, presupposes that there are national inspection agencies responsible for workers' health and safety.<sup>210</sup>

89. It has not yet been established if the removal of civil liability for breach of regulations implementing EU law is compatible with the principles of effectiveness and equivalence. If, in addition, the HSE ceased to be able to enforce regulations in practice, the argument for a breach of the principle of effectiveness would be strengthened. Yet more clearly, in respect of the many sets of implementing rules where the exclusive remedy is a civil action, the compensation must be adequate for the loss and be a genuine deterrent. These rules, then, place clear limitations on what a Member State can do while it is in the EU. Should the UK leave the EU, it would be free to legislate as it wished - e.g. capping claims for civil compensation for any kind of breach of regulation or making some kinds of damages irrecoverable.
90. In summary: so far as I am aware there is no requirement of EU law that any particular form of remedy be available for infringement of EU rights. But the overriding consideration is that there are effective sanctions. So if the means chosen is civil compensation for breach, as is the case with most domestic legislation implementing EU Directives in employment, compensation must be full; if the means chosen are criminal sanctions, these must in practice work effectively. A Brexit would place an end to these important limitations on the UK Government's power.

#### **(4) The Protection of Domestic Legislation or the Common Law**

91. The fourth issue on which I am asked to advise is how national legislation or the common law will or is likely to protect workers' rights in the event of Brexit. This is potentially a large topic but I will summarise the position.
92. **The common law.** It is no exaggeration to say that, apart from health and safety where the common law of negligence provides a reasonable degree of

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[2013] IRLR 890.

<sup>209</sup> See e.g. Article 9 of the Manual Handling Directive.

<sup>210</sup> See Articles 10(3)(c) and 11(6).



protection to injured workers, the common law provides almost no effective protection of workers' rights. To summarise:

- (1) The common law of contract gives almost no recognition of the inequality of bargaining power which is a normal incident of the individual employment relationship.<sup>211</sup> It is consequently entirely possible for the party with greater bargaining power, almost always the employer, to dictate terms. It is precisely for this reason that worker protection statutes prohibit contracting out save in certain specified circumstances, such as settlement of legal disputes<sup>212</sup> (though the last Government already took some steps to undermine this fundamental principle<sup>213</sup>); if they did not, standard form contracts, given on a 'take it or leave it' basis would contract out of all social rights. A contract could validly provide that a worker is entitled to pay at a derisory level (even no pay, as in the case of interns), is guaranteed no work (as is the case for workers on zero hours contracts), is required to work overtime for nil pay, is entitled to no holiday or no paid holiday, and can be dismissed at any time for any or no reason on one day's notice. These may be extreme examples but even more extreme provisions were included in contracts in the past, when freedom of contract dominated.<sup>214</sup> They illustrate that contract law provides almost no protection against the party who is able to dictate the express written terms - hence the repeated need for statutory intervention, even simply to establish minimum notice periods,<sup>215</sup> and something clearly demonstrated today by the terms of employment of some 'precarious' workers, such as those on zero hours contract. As a matter of contract

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<sup>211</sup> The exception which proves the rule is that courts now recognise inequality of bargaining power as relevant to whether a contract of self-employment is a sham: see *Autoclenz v Belcher* [2011] ICR 1157.

<sup>212</sup> See e.g. ERA s.203.

<sup>213</sup> See the new category of employee shareholder in s.205A ERA, a form of contracting out of some labour rights.

<sup>214</sup> Past contractual provisions included terms by which fines were deductible from wages for poor performance, wages were only payable at the completion of the period of hiring (such as a year), so that no wages were payable at all if a contract was terminated for breach beforehand: see Cornish, *The Oxford History of the Laws of England*, Vol XXIII, pp 636-49.

<sup>215</sup> Dating back to the Contracts of Employment Act 1963.

law, for example, any strike is a fundamental breach of contract which entitles the employer to terminate the employment summarily with no pay or to deduct wages for the strike days.

- (2) The only realistic antidote to the common law's approach to terms and conditions of employment is by collective bargaining, which is often an effective means of redressing the inequality of bargaining power in the relationship between individual employee and employer. But collective bargaining is not encouraged or mandated by the common law, and its operation has largely occurred despite the law not because of it;<sup>216</sup> the common law continues to look at the contract of employment through the prism of the relationship between the individual parties. Where it exists, collective bargaining may provide a factual corrective to the imbalance of power between the worker and employer (e.g. on pay rates); where it does not exist, the common law provides workers with almost no significant protection.
- (3) Judges sometimes celebrate the development of the implied term of trust and confidence, by which an employer must not without reasonable and proper cause conduct itself in a manner which is calculated or likely to damage the relationship of trust and confidence in the employment relationship.<sup>217</sup> But in practical terms the implied term places little brake on an employer who wishes to introduce terms of employment which are highly unfair, or to change terms and conditions to workers' detriment. The implied term has little to say about e.g. the level of pay. Most important of all the implied term has no application at all to the decision to dismiss, so that the common law continues to allow an employer to dismiss arbitrarily, for any reason or no reason.<sup>218</sup> Consequently, an employer who wishes to change

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<sup>216</sup> Hence the celebrated phrase of Kahn-Freund, describing the past system in the UK as based on 'collective *laissez-faire*'.

<sup>217</sup> See *Malik v BCCI* [1997] ICR 606, especially per Lord Steyn.

<sup>218</sup> *Johnson v Unisys* [2001] ICR 480. There is an unusual exception for 'office holders' or those whose terms and conditions are underpinned by statute; these exceptions are irrelevant to most workers.

workers' terms and conditions to their detriment can, at common law, simply dismiss them on notice and give them offers of new, worse, terms and conditions. As a matter of contract law, this strategy, commonly employed in the context of e.g. pay cuts in recent years, involves no breach of contract - dismissal is on notice, in accordance with the contract, and the workers then 'agree' to the new terms. The workers options are to have no job or to accept new, worse, terms. It has the result that what look like contractual 'rights' are effectively written in sand: the employer can dictate their content by its unconstrained right to dismiss and to replace them with new terms and conditions.

- (4) Even if a dismissal is in breach of contract because e.g. the employer was not entitled to dismiss summarily, damages are limited to the lost earnings during the notice period which, for most employees, is a minimal amount. Damages are not available for the loss of reputation to a wrongfully dismissed employee, even where this is caused by breach of an express term: see *Edwards v Chesterfield* [2012] 2 AC 22 - a remarkable decision, unique in not allowing damages for breach of contract, but illustrative of the common law's jealous preserve of the employer's prerogative power to dismiss.
- (5) In the sphere of health and safety, the common law tort of negligence provides a degree of significant protection. But it is still subject to important limitations. First, it is necessary to prove that an employer was at fault, which means it is harder to succeed in claims than for breaches of 'strict' statutory duties; this is shown by the decision in *Stark v Post Office* [2000] ICR 1013 where the Court of Appeal held that the duty to maintain work equipment in good repair, flowing from the Work Equipment Directive, was a strict obligation so that an employer was liable for a defect in postal worker's bike, even though this would not have been revealed by an inspection.<sup>219</sup> Second, the tort

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<sup>219</sup> Workers can no longer rely on this ruling in personal injury claims because the Government has now removed civil liability for breach of regulations under the HSWA: see above.

requires in general terms a personal injury for a claim and does not, save in some unusual circumstances, provide a remedy for economic loss.<sup>220</sup> It will not assist workers who are subject to detrimental treatment where they do not suffer any physical or psychiatric injury.

93. I doubt that *any* of the social rights which I have set out above are part of the common law or are significantly protected by it; to the extent they can be read into the implied term of trust and confidence, the protection of the common law is illusory because the employer can always just dismiss an employee who it does not like or wish to retain by giving notice. The common law provides no restriction on the power of the employer to dictate the terms of the contract; allows the employer to change those terms at any time by the device of dismissal and re-engagement; provides no restriction whatsoever on the right of an employer to dismiss for any or no reason; and gives no proper compensation for wrongfully dismissed employees. The only valid protection given by the common law is to those workers unfortunate enough to suffer an injury due to their employer's fault.
94. **Legislation.** The extent to which, post-Brexit domestic legislation continues to provide protection for workers is, in essence, a judgment about the direction of future politics. In areas in which the EU does not have competence, such as pay or dismissal,<sup>221</sup> national law alone provides some protection, in the form of the National Minimum Wage Act and unfair dismissal law (for those employees with sufficient continuous employment). Those rights are unaffected by EU law. Though for the moment the national minimum wage has a degree of political consensus, illustrated by the forthcoming National Living Wage,<sup>222</sup> I do not think the same can be said of unfair dismissal law, in relation to which the coalition Government already took steps to reduce its impact by increasing the qualifying period from one year to two, reducing the amount of compensation to a maximum of one year's pay and introducing a

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<sup>220</sup> But cf. *Spring v Guardian* [1994] ICR 496: duty to take reasonable care and skill in providing reference.

<sup>221</sup> See e.g. Article 153(5) and the discussion of AG Trstenjak in *British Airways v Williams* [2012] ICR 847 at §§60-92 and *Poclava* [2015] IRLR 453.

<sup>222</sup> See now the National Minimum Wage (Amendment) Regulations 2016.

form of contracting out by means of employee shareholders.<sup>223</sup> As to rights backed by EU law, I have identified likely targets, in the medium- and long-term, especially of a Government dominated by an ideology of deregulation. It is easy to contemplate a complete reversal of the gradual increase in social regulation protecting workers which has taken place since the 1960s, just as past Conservative Governments radically overhauled the law on strikes from the 1980s onwards.

#### **(5) Enforcing and Relying on EU law and ECJ judgments after Brexit**

95. The final question on which I am asked to advise is the mechanisms for enforcing EU-derived rights after Brexit, and the extent to which the case-law of the ECJ would continue to apply. Several fundamental consequences would follow.
96. First, workers in the UK would no longer be able to rely on the doctrine of direct effect. This would mean that they could not enforce sufficiently precise Articles of Directives against emanations of the state, and could not rely horizontally, against private employers, on sufficiently precise Articles of the Treaties (such as Article 157 TFEU on equal pay), directly effective Articles of the EU Charter or the direct effect of fundamental principles of EU law, such as the right not to be discriminated against. This means that if the UK Government repealed existing domestic implementing legislation, workers would be left with no means of upholding rights flowing from EU law. Suppose, for example, post-Brexit the Government repealed the Working Time Regulations. There would be nothing left for workers to enforce in relation to their working time, save what the employer chose to give them as contractual rights.
97. Second, once the UK leaves the EU, any EU Directives conferring social rights or amending existing Directives post-Brexit would be largely irrelevant in the UK. A UK court might look at them, but it is hard to see how they would be relevant to the interpretation of national law because national law would no longer be implementing, or intended by Parliament to implement, those later

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<sup>223</sup> See ss 108(1), 124(1ZA), 205A ERA.

Directives.

98. The most complicated area is likely to be the effect on the interpretative obligation, referred to as the *Marleasing* duty. As noted above, this duty has radical implications, and has enabled the domestic courts to read words into domestic statutes to comply with EU law. The origin of the duty is based on the TEU and, in particular, the duty of a Member State under Article 4(3) TEU to take “any appropriate measures...to ensure fulfilment of the obligations arising from the Treaties” or from other EU legal instruments, and to ensure the full effect of EU law in each Member State, a duty which applies equally to a Member State and the courts in the UK: see *Von Colson* [1984] ECR 1891, *Marleasing* [1990] ECR I-4135 at §8, and *Pfeiffer* [2005] ICR 1307 per the Grand Chamber of the ECJ at §§110-114.
99. Once that keystone to the duty is removed, and the associated duties in the Treaties such as e.g. that a Directive is binding as to the result to be achieved,<sup>224</sup> I think the radical effect of the *Marleasing* duty will gradually be lost. The fundamental objective of statutory interpretation from a domestic perspective is to determine the intention of Parliament, based above all on the language used by Parliament in that legislation. To begin with the courts might accept that some, unrevoked, regulations implementing EU law were intended to give effect to the Directive and so should be interpreted in that light. But these domestic rules would reach their limit in cases such as *Coleman No. 2* (provisions on associate discrimination read into DDA) or *Bear Scotland* (words added to Working Time Regulations to ensure workers received correct level of holiday pay). Domestic courts are likely, that is, to pay much more regard to the words used by Parliament, and are unlikely to ‘distort’ the natural meaning to ensure compliance with what the ECJ decides a Directive, approached in accordance with its objectives, should mean. I think over time the duty to interpret will become much less aggressive, similar to how the courts approach the duty to interpret national law in the case of ‘normal’ Treaties to which the UK is a signatory.<sup>225</sup>

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<sup>224</sup> Article 288 TFEU.

<sup>225</sup> See §10 above.

100. This division between ECJ decisions on Directives and domestic courts' rulings on regulations will, I think, only grow deeper across time. First, it will no longer be possible for a domestic court to refer a question to the ECJ on the proper interpretation of a Directive under Article 267 TFEU, as is common at the moment. There are several good examples where domestic courts apparently changed their mind about the proper interpretation of a domestic statute only because of a ruling of the ECJ from a reference: see e.g. *Webb v EMO* where, prior to the reference, the House of Lords seemed to consider a comparator was required in pregnancy discrimination only to change its mind after the judgment of the ECJ.<sup>226</sup> Second, across time, the domestic courts will come to return to more traditional means of interpretation, giving greater prominence to the language used by Parliament and less weight to decisions of the ECJ based on the meaning of the Directive. The result will be a much decreased ability to give reinterpretations to implementing regulations which are different from how they would be ordinarily interpreted.
101. But there is a third, more fundamental, reason why rulings of the ECJ on what a Directive meant would be much less significant. Suppose the ECJ delivered a judgment on interpretation of a Directive which was favourable to workers, and the domestic courts followed that ECJ ruling because they considered Parliament intended to enact implementing legislation which complied with the Directive and the domestic legislation could be interpreted in that light. Freed from the obligation to comply with EU law under the Treaties, a Government which was opposed to that ruling could then simply pass legislation to reverse the effect of the judgments of the ECJ and/or of the domestic courts. The Government would have the same freedom and power it has when a domestic court gives a ruling on a domestic statute with the Government opposes: it can change the law, at least for the future. I very much doubt, for example, that the Government would have stood by had the domestic courts interpreted equal pay laws or working time rules in the way the ECJ has done. It would simply have used Parliamentary sovereignty to reverse the court rulings it did not like. For the future, the Government's

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<sup>226</sup> See [1993] ICR 175 and compare its decision after the ruling of the ECJ - [1995] ICR 1021.

power is facilitated because much of the domestic legislation implementing EU law (and setting out other labour rights) is set out in statutory instruments, which can quickly be revoked or amended. There are already good examples of the Government acting speedily to amend primary legislation to protect businesses, illustrated by the statutory instrument made only about one month after the ruling in *Bear Scotland* and which amended ERA 1996 to limit the temporal effect of holiday pay claims.<sup>227</sup> The Government clearly thought the decision was detrimental to businesses and so did what it thought it could get away with to reverse it. Following Brexit, the Government's power to do this would greatly increase.

### **Summary**

102. This Advice has covered a very wide territory and much detail. It is not easy to summarise the key conclusions but below I try to do so.
103. First, some areas such as pay and dismissal are excluded from the scope of EU social law and are thus largely within the domain of national law. The principal areas of rights at work on which EU law has had and continues to have a very significant effect include the following:
  - (1) Discrimination of all kinds now protected under the EqA 2010,<sup>228</sup> at all stages of employment, including selection for employment, pay and working conditions, dismissal and treatment post-employment
  - (2) Protection of pregnant workers, and rights to maternity and parental leave.
  - (3) Protection of part-time and fixed-term workers.
  - (4) Protection of agency workers.

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<sup>227</sup> See the Deduction from Wages (Limitation) Regulations 2014, made on 17.12.14 when the judgment in *Bear Scotland* was handed down in November 2014.

<sup>228</sup> Note the slightly different treatment of nationality discrimination.



- (5) Important rights relating to working time, including rights to daily and weekly rest, maximum weekly working time, paid annual leave and measures to protect night workers.
  - (6) Legal rights to collective information and consultation which operate now across a broad range of contexts, including collective redundancies, transfers of undertakings, health and safety, and in all undertakings above a certain size.
  - (7) Protection of rights of workers in the event of transfers of undertakings, especially relevant to contracting out exercises.
  - (8) Many important regulations on health and safety at work.
  - (9) Important protection of workers' rights, guaranteed by the State, in the event of the insolvency of their employer.
  - (10) Other provisions, including rights to a written statement of terms and conditions, protection of data processing and collection on workers, and some, limited, rights in the EU Charter, and guarantees of legally required terms and conditions to posted workers.
104. These EU social rights, second, are currently the subject of very strong legal guarantees, much stronger than other rights flowing from international treaties signed by the UK. By a variety of means, the UK Government, State bodies and the courts are required to give effect to EU-derived employment rights, and to ensure effective remedies for infringement of those rights, including full compensation where the means of enforcement is individual claims. They effectively prevent the Government acting to override them, and require the UK to give full practical effect to them.
105. Third, at present almost all EU-derived employment rights operate as a floor, not a ceiling and do not prevent a Member State, if it so chooses, enacting domestic legislation which gives a higher level of protection to workers. The

partial exception to this is the effect of economic freedoms in the Treaties as they intersect with the Posted Workers Directive; but these freedoms operate more as a brake on collective action than on legal measures to improve workers' rights.

106. Fourth, in the event of Brexit, a future Government would have almost complete legal freedom of action in relation to those areas of working life currently protected by EU social rights. The duties set out in other international treaties which the UK has ratified place a much weaker restraint on a Government committed to deregulation in the employment sphere.
107. Fifth, it is much harder to predict which provisions currently guaranteed by EU law a future Government with a deregulatory agenda would target for repeal or amendment in the near future, but I have tried to identify likely targets based on policy documents of the present and previous Governments. I think that EU-guaranteed rights especially vulnerable to repeal in the name of deregulation, austerity or reducing burdens on business include provisions on collective consultation; many working time rights (especially the level of pay in respect of annual leave); some of the EU-derived health and safety regulations; substantial parts of TUPE; legislation protecting agency workers and other 'atypical' workers; and those elements of discrimination law imposing what are seen as large financial awards on employers, such as equal pay awards for long-standing discrimination in pay arrangements (and perhaps discrimination on which there is less political consensus, such as age discrimination). Provisions which place significant costs on businesses or the Government, such as insolvency protection, are also vulnerable to repeal in times of austerity. But all the social rights in employment currently required by EU law would be potentially vulnerable and a Government highly committed to labour market deregulation might go much further.
108. Sixth, the likely legal mechanism used to amend or repeal legal rights guaranteed by EU law would not simply be the repeal of the ECA 1972. It is more likely that a Government with a deregulatory agenda would revoke, amend or repeal legislation piece by piece, including transitional provisions to

clarify how these changes affect past and future transactions.

109. Seventh, Member States are required to ensure that sanctions for breach of EU-derived rights are effective, proportionate and dissuasive and provide analogous procedural rules and penalties as apply to similar infringements of national law. These rules mean that if civil claims are the route chosen for enforcing EU rights, which they usually are, the compensation must be and adequate and a genuine deterrent; if criminal sanctions are used, they too must ensure adequate protection in practice. A Brexit would free a Government from these constraints, allowing it to introduce caps on compensation or other measures to limit the practical enforcement of rights.
110. Eighth, the common law provides almost no effective protection of workers' rights because it places no effective restriction on the power of the employer to dictate the terms of the contract; allows the employer to changes those terms at any time by the device of dismissal and re-engagement; provides no restriction whatsoever on the right of an employer to dismiss for any or no reason; and gives no proper compensation for wrongfully dismissed employees. The only valid protection given by the common law is to those workers unfortunate enough to suffer an injury due to their employer's fault. Whether statute law would compensate workers for the absence of protection under common law is, ultimately, a political question; but the signs from the previous and present Government point to a reversal of many of the important social rights currently guaranteed by EU law.
111. Ninth, post-Brexit the mechanisms for enforcing EU-derived rights would greatly diminish. Workers will not be able to enforce EU rights directly; the duty to interpret national law in accordance with EU law will greatly weaken; and, most fundamentally, a future Government could simply reverse legal rulings it did not like.

**MICHAEL FORD QC**  
**10 March 2016**

